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332-965—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 228

JOHN T. WILLINGHAM AND C. A. JARVIS, PETITIONERS

v.

DANIEL MORGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RELEVANT DOCKET ENTRIES

No. 40038—In Leavenworth County District Court, Kansas

Date	*Filings—Proceedings*
1966	
July 27	Verified Complaint for Damages.
Aug. 12	Answer of defendants John T. Willingham and C. A. Jarvis.
Aug. 16	Plaintiff's Notice and Service of Interrogatories and Interrogatories.

No. T-4113—In United States District Court for the District of Kansas

1966	
Aug. 25	Petition for removal of action to the United States District Court from Leavenworth County District Court filed.
Aug. 26	Notice of removal filed.
Aug. 30	Certificate of removal from the Clerk of Leavenworth County District Court together with Verified Complaint for Damages, summons, *Answer* of deft. John T. Willingham and C. A. Jarvis, notice and service of interrogatories filed.

Date 1966	Filings—Proceedings
Aug. 31	Deft's motion to enlarge time of answer or object to the interrogatories filed.
Sep. 2	Pltf's verified motion for remand of action to the District Court for Leavenworth County, Kansas filed.
Sep. 2	Pltf's notice of motion for remand filed.
Sep. 6	Pltf's opposition to motion to enlarge time of answer filed.
Sep. 9	At Topeka, Templar—J: Deft's motion for enlargement of time to answer or object to pltfs interrogatories—passed. Pltf's motion to remand—passed. Counter designation—Pltf—Kansas City, Deft—Topeka—passed.
Sep. 14	Pltf's verified motion for order compelling answers to interrogatories, or in the alternative, for judgment by default filed.
Sep. 14	Pltf's notice of motion for order compelling answers, or, in the alternative, for judgment by default filed.
Oct. 7	Deft's motion for summary judgment filed.
Oct. 13	Deft's memorandum of authorities in support of motions for summary judgment filed.
Oct. 14	At Topeka, Templar—J: Defts motion for enlargement of time to answer or object to interrogatories—passed. Defts motion for summary judgment—passed. Pltf's motion to remand—taken under advisement. Pltf's motion for order compelling answer to interrogatories or in alternative for judgment by default—passed. Counter designation: Pltf—Kansas City, Deft—Topeka—passed. Pltf's oral motion to dismiss Cts 1, 2, 3, 8, 10—sustained.
Oct. 18	Ruling on pltf's motion to remand filed and entered. Templar—J. Pltf's motion to remand case to the State Court—overruled and denied. Pltf's granted 15 days from October 13, 1966 to file answer to the government's brief in re: Deft's motion for summary judgment. cc to Daniel Morgan, William Hergenreter and U.S. Attorney.

Date 1966	Filings—Proceedings
Oct. 24	Affidavit of John T. Willingham in support of motion for summary judgment filed.
Oct. 24	Affiidavit of C. A. Jarvis in support of motion for summary judgment filed.
Nov. 3	Pltf's opposition to defts' motion for summary judgment filed with brief in opposition to motion for summary judgment.
Nov. 8	Pltf's motion for production of documents and notice of motion for production of documents filed, and affidavit of Daniel Morgan.
Nov. 21	Defts' John T. Willingham and C. A. Jarvis reply brief filed.
Dec. 7	Pltf's rebuttal to "reply brief" of defts John T. Willingham and C. A. Jarvis filed.
Dec. 9	At Topeka, Templar—J: Deft's motion to enlarge time to answer or object to pltfs interrogatories, Pltf's motion for order compelling answer to interrogatories or in alternative for judgment by default, Deft's motion for summary judgment, Pltf's motion for production of documents, Counter designation: Pltf—Kansas, Deft—Topeka—all motions passed.
Dec. 14	Memorandum of Decision, sustaining motion of defendants Willingham and Jarvis for summary judgment filed and entered. Templar—J. Pltf's complaint against the defendants Willingham and Jarvis is dismissed. cc to Daniel Morgan and U.S. Attorney.
Dec. 14	Judgment on decision by the Court filed. Motion of deft John T. Willingham and C. A. Jarvis for summary judgment against the pltf, Daniel Morgan, be and the same is hereby granted, and the pltf's complaint and the cause of action sought to be stated therein against the defts Willingham and Jarvis is dismissed. cc to Daniel Morgan and U.S. Attorney.
Dec. 22	Pltf's motion to correct record and "Memorandum of Decision" filed. cc to U.S. Attorney.

Date	Filings—Proceedings
1966	
Dec. 23	Order sustains in part pltf's motion to correct the judgment entered by the Clerk and directs that the word "consideration" be substituted for the word "hearing", and the word "considered" be substituted for the word "heard". All other requests in the motion are denied. Court also denied pltf's motion for order compelling answer to interrogatories or in the alternative for judgment be default; denies pltf's motion for production of documents; denies pltf's petition for a writ of habeas corpus ad testificandum and denies his request as "attorney" for pltf. for issuance of subpoenas. filed and entered. Templar—J. cc to Daniel Morgan and U.S. Attorney.
Dec. 27	Amended judgment on decision by the Court filed. as per order filed December 23, 1966. cc to Daniel Morgan and U.S. Attorney.
1967	
Jan. 6	Petitioner's Notice of appeal filed. copy to U.S. Attorney
Jan. 6	Petitioner's petition for leave to prosecute appeal herein in forma pauperis filed.
Jan. 6	Petitioner's designation of record on appeal filed.
Jan. 9	Order permitting appeal in forma pauperis filed and entered. Templar—J. copy to petr.; copy to U.S. Attorney.
Jan. 10	Amended order permitting appeal in forma pauperis filed and entered. Templar—J. copy to petr; copy to U.S. Attorney.
Feb. 1	Original and two copies of record on appeal forwarded to Circuit Court at Denver.
Feb. 24	Supplemental record on appeal transmitted to Circuit Court.

No. 9281—In United States Court of Appeals for the Tenth Circuit

Date	*Filings—Proceedings*
1967	
Oct. 5	Opinion of Court of Appeals.
Oct. 5	Judgment of Court of Appeals.
Oct. 24	Motion for extension of time in which to file Petition for Rehearing.
Oct. 27	Order extending time within which appellees may file a petition for rehearing.
Oct. 30	Appellant's verified opposition to appellees' motion for further delay herein; and Appellant's verified motion for order directing Clerk not to file any Petition for Rehearing herein which has not been filed in this Court on or before October 26, 1967.
Nov. 6	Order overruling appellant's objections to extension of time for filing a petition for rehearing.
Nov. 22	Petition for Rehearing filed.
1968	
March 11	Order denying petition for rehearing.
March 22	Motion to stay mandate.
March 28	Order staying mandate for 30 days, or if petition for writ of certiorari filed within that time, until final disposition by Supreme Court.
April 16	Motion for additional stay of mandate.
May 27	Order granting motion.

No. 228—In the United States Supreme Court

1968	
June 10	Order extending time to file petition for writ of certiorari until June 24, 1968.
Dec. 9	Order of Supreme Court granting certiorari.

In the United States District Court for the District of Kansas

Civil Action No. T–4113

DANIEL MORGAN, PLAINTIFF

vs.

JOHN T. WILLINGHAM, C. A. JARVIS, THE FIRST DOE CORPORATION, THE SECOND DOE CORPORATION, THE ROE COMPANY, AND DOE NUMBERS 1 THROUGH 72, DEFENDANTS

Petition for Removal of Action to the United States District Court

[FILED AUG. 25, 1966]

Come now the above-named defendants and petitioners, John T. Willingham and C. A. Jarvis, and for their petition for removal of an action now pending in the District Court of Leavenworth County, Kansas, to the above-entitled court, say and allege:

1. That the defendant and petitioner John T. Willingham is and was at all times herein and in plaintiff's petition or complaint mentioned, the warden of the United States Penitentiary at Leavenworth, Kansas and as such is and was an officer of the United States of America and a person acting under officers of the United States of America.

2. That the defendant and petitioner, C. A. Jarvis, is and was at all times herein and in plaintiff's complaint or petition mentioned, an employee of the United States Public Health Service and assigned to the United States Penitentiary, Leavenworth, Kansas and as such is and was an officer of the United States of America and a person acting under officers of the United States of America.

3. That on or about the 27th day of July, 1966, the above-named plaintiff, Daniel Morgan, filed a civil action against the above-named defendants in the District Court of Leavenworth County, Kansas entitled; Daniel Morgan, plaintiff, vs. John T. Willingham, C. A. Jarvis, and The First Doe Corporation, The Second Doe Corporation, The Roe Company and Doe numbers 1 through 72, defendants, number 40038 upon the civil appearance docket of the District Court of Leavenworth County, Kansas, and that these petitioners were each served with a summons in said action and a copy of plaintiff's petition or

complaint filed in said action by the Sheriff of Leavenworth County, Kansas on the 28th day of July, 1966.

4. That a copy of said petition served upon these petitioners is attached hereto and marked Exhibit "A" hereto, and a copy of said summons served upon these petitioners is attached hereto and marked Exhibit "B" hereto, the summons served upon each petitioner being identical to the summons served upon the other petitioner.

5. That in said petition it is alleged, among other things as follows:

In Counts I and II, that the defendants did, with intent to wrongfully inflict harm, or injury, wilfully wantonly, and maliciously inoculate the plaintiff or cause him to be inoculated, contrary to law, with a deleterious foreign substance, serum or drug, capable of producing death or great bodily or other serious injury to the user or recipient thereof, thereby causing extensive or serious injury to the heart, mind, and other vital organs of the plantiff, and thus rendering and leaving him permanently sick or ill.

In Count III, that the defendants or agents did wrongfully compel or force the plaintiff to submit, contrary to law, to inoculations of a deleterious foreign substance, serum or drug, into his arm, veins, bloodstream or body causing him to be injured in the manner and to the extent alleged in Count V of his complaint.

In Count IV, that the defendants ordered and utilized penitentiary inmates or prisoners, and other persons, not qualified or licensed to prescribe, dispense or administer dangerous drugs or to practice medicine in the State of Kansas, to inoculate the plaintiff with a deleterious foreign substance, serum or drug, capable of producing death or great bodily or other serious injury to the user or recipient thereof, resulting in permanent injury to plaintiff.

In Count V, that as a direct result of the injection of a deleterious foreign substance, serum or drug, into the arms, veins, bloodstream or body of the plaintiff, plaintiff was caused to lose consciousness and fall with great force and violence on and against a concrete floor, injuring his head and various parts of his body.

In Count VI, that defendants negligently or wrongfully manufactured and engaged in the transshipment, facilitation, sale, delivery or distribution, for human use or consumption, certain

deleterious foreign substance, vaccine, serum or drug, capable of causing death or great bodily or other serious injury to the user or recipient, without attaching to the same an adequate or proper label giving notice of its dangerous or deadly qualities, and failed to include adequate directions for its proper and safe use, all of which being contrary to law and to the hurt, injury or detriment of plaintiff.

In Count VII, that as a direct result of the use by plaintiff of a deleterious foreign substance, serum or drug, wrongfully prepared, manufactured, packaged, transhipped, sold, delivered or distributed, plaintiff was caused to lose consciousness and fall with great force and violence on and against a concrete floor, resulting in the injuries described in Count V of plaintiff's complaint.

In Count VIII, that the defendants well knew that plaintiff was afflicted with a weak heart or cardiac disease and plaintiff had been inoculated with a deleterious foreign substance, serum or drug, capable of producing death or great bodily or other serious injury to the user or recipient thereof, did, contrary to law and against the advice, directive or order of competent medical doctors, force or compel plaintiff to perform various strenuous tasks, work or exercises which caused serious injury to the heart and other vital organs of plaintiff and thus rendering and leaving him permanently injured.

In Count IX, the defendants did wilfully, wantonly or wrongfully, and contrary to law, assault, batter, club, choke and torture the plaintiff, severely injuring the plaintiff and various parts and members of his body.

In Count X, that the defendants had knowledge of the wrongs done in Counts I through IX of plaintiff's complaint and having power to prevent or aid in preventing the same, neglected or refused to do so and that by reason of the several torts alleged in Counts I through X of plaintiff's complaint, the plaintiff's health has been undermined, impaired and adversely affected, as a result of which he will be required to pay medical bills or expenses for the remainder of his life to relieve him of the hurt, pain and suffering occasioned by his injuries and plaintiff's earning power has been reduced to virtually zero percent.

6. That in said petition, plaintiff seeks judgment against the petitioner, John T. Willingham, in the total sum of $2,220,000.00 and a judgment against the petitioner, C. A. Jarvis, in the total sum of $1,065,000.00.

7. That plaintiff is and was at all times herein mentioned, or in plaintiff's petition or complaint mentioned, a duly committed prisoner or inmate of the United States Penitentiary at Leavenworth, Kansas.

8. That any act or thing that these petitioners, or either of them may have done or authorized to be done concerning the plaintiff as alleged and complained of by plaintiff in his said complaint or petition, was done and made by them in the course of their duties as officers of the United States of America and as persons acting under officers of the United States of America and under color of such offices and by virtue thereof; namely, as warden of the United States Penitentiary at Leavenworth, Kansas and as an employee of the United States Public Health Service assigned to the United States Penitentiary at Leavenworth, Kansas, respectively; and that the acts complained of were made solely under color of their respective offices and within the scope of their authority.

9. That pursuant to the provisions of Title 28, United States Code, section 1442(a)(1), these petitioners are entitled to have said action in the District Court of Leavenworth County, Kansas aforesaid removed to the United States District Court for the District of Kansas.

10. That these petitioners do not know the identity of any of the persons referred to as First Doe Corporation, Second Doe Corporation, Roe Company and Doe numbers 1 through 72, as co-defendants with these petitioners in said action in the District Court of Leavenworth County, Kansas.

11. That this petition is being filed within thirty days after the receipt by petitioners through service of a copy of the initial pleading setting forth the claims for relief upon which such action is based, and within thirty days after the filing of said suit in the District Court of Leavenworth County, Kansas.

12. That in accordance with Rule 6 of the Rules of Practice of this Court and 28 U.S.C. 1446(d), a bond with good and sufficient surety, approved by the Clerk of this Court, conditioned that the petitioners will pay all costs and disbursements incurred by reason of these removal proceedings should it be determined that said action was not removable, or was improperly removed, accompanies and is being filed contemporaneously with this removal petition.

WHEREFORE, the above premises considered, these petitioners pray that said action in the District Court of Leaven-

worth County, Kansas, aforesaid be removed to the United States District Court for the District of Kansas at Topeka, Kansas, and that no further proceedings be had in said action in the District Court of Leavenworth County, Kansas.

JOHN T. WILLINGHAM,
Petitioner.

C. A. JARVIS,
Petitioner.

AFFIDAVIT

STATE OF KANSAS
County of Leavenworth, ss:

JOHN T. WILLINGHAM and C. A. JARVIS, each of lawful age, and each having been first duly sworn according to law, upon his respective oath says and deposes:

That they are one and the same persons as the above-named defendants John T. Willingham and C. A. Jarvis, respectively, and as such are the petitioners in the above and foregoing petition for removal. That each has read the above and foregoing petition for removal and is acquainted with and understands the contents thereof; and that all the allegations, statements and averments therein contained are true and correct.

Further, each affiant saith naught.

JOHN T. WILLINGHAM,
Affiant.

C. A. JARVIS,
Affiant.

Subscribed in my presence and sworn to before me by each of the above-named affiants, John T. Willingham and C. A. Jarvis, at my office in the City of Leavenworth, Leavenworth County, Kansas, this 25th day of August, 1966.

(SEAL) RAYMOND E. JONES,
Notary Public, Leavenworth County, Kansas.

My Commission Expires 1–26–67.

ATTEST: A true copy.

CHARLES W. CAHILL, *Clerk.*
By SHARON L. PRATT, *Deputy.*

Exhibit "A"

In the District Court of the State of Kansas
County of Leavenworth

Civil Action No. 40038

DANIEL MORGAN, Box 1000, LEAVENWORTH, KANSAS, PLAINTIFF

v.

JOHN T. WILLINGHAM, C. A. JARVIS (BOTH OF WHOM MAY BE SERVED WITH SUMMONS AT THE UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS) WHERE THEY ARE EMPLOYED AND IN RESIDENCE AND THE FIRST DOE CORPORATION; THE SECOND DOE CORPORATION; THE ROE COMPANY, AND DOE NUMBERS 1 THROUGH 72 (ADDRESSES OF THE ABOVE CORPORATIONS, COMPANY, AND PERSONS IS UNKNOWN), DEFENDANTS

VERIFIED COMPLAINT FOR DAMAGES

Plaintiff complains and brings this tort action under the laws of the State of Kansas against the defendants John T. Willingham, C. A. Jarvis, The First Doe Corporation, The Second Doe Corporation, the Roe Company and Doe numbers 1 through 72, jointly, and severally and in their capacity as individuals or private persons.

The amount in controversy in this lawsuit is substantially in excess of $10,000.

Because the names and addresses of the Doe defendants are at this time unknown to the plaintiff, plaintiff sues such defendants under the fictitious names of the First and Second Doe Corporation, The Roe Company, Doe numbers 1 through 72; and plaintiff hereby moves the Court for leave to amend this Complaint to include there in such persons' true name or identity whenever the same is discovered.

Plaintiff alleges and complains:

Count II

That on or about April 12, 1966, and on numerous and divers subsequent dates, at and in the County of Leavenworth, State of Kansas, defendants 1 through 3 and defendants numbers 6 through 20, and their agents, did, with intent to wrongfully inflict harm, or injury, wilfully, wantonly, and maliciously, inoculate the plaintiff or caused him to be inoculated, contrary

to law, with a deleterious foreign substance, serum or drug, capable of producing death or great bodily or other serious injury to the user or recipient thereof, thereby causing extensive or serious injury to the heart, mind, and other vital organs of the plaintiff and by thus rendering and leaving him permanently sick, lame, cripple or ill.

Count II

That on or about April 12, 1966, and on numerous and divers subsequent dates, within the County of Leavenworth, State of Kansas, defendants numbers 1 through 3, and defendants numbers 6 through 20, and their agents, did wrongfully, carelessly or negligently, inject into plaintiff's arms, veins, bloodstream or body, or caused to be injected into same, contrary to law, a deleterious foreign substance, serum or drug, capable of producing death or great bodily or other serious injury to the used or recipient thereof, thereby causing extensive or serious injury to the heart, mind, and other vital organs of the plaintiff, and by thus rendering and leaving him permanently sick, lame, cripple or ill.

Count III

That on or about April 12, 1966, and on numerous and divers subsequent dates, within the County of Leavenworth, State of Kansas, defendants numbers 1 through 3, and defendants number 6 through 20, and their agents, did wrongfully compel or force the plaintiff to submit, contrary to law, to inoculations of a deleterious foreign substance, serum or drug, into his arms, veins, bloodstream or body causing him to be injured in the manner and to the extent alleged in Count V of this Complaint.

Count IV

That on or about April 12, 1966, and on numerous and divers subsequent dates, within the County of Leavenworth, State of Kansas, defendants numbers 1 through 3, and defendants numbers 6 through 20, and their agents, did wilfully, maliciously, wantonly and contrary to law, order and utilize penitentiary inmates or prisoners, and other persons, not qualified or licensed to prescribe, dispense or administer dangerous drugs or to practice medicine in the State of Kansas, to inoculate the plaintiff with a deleterious foreign substance, serum or drug, capable of producing death or great bodily or other serious injury to the user or recipient thereof, resulting in permanent injury to this plaintiff.

Count V

That on or about June 15, 1966, and on divers other dates, within the County of Leavenworth, State of Kansas, as a direct results or proximat cause of the wilful, negligent or wrongful dispensation, administration, inoculation and/or injection of a deleterious foreign substance, serum or drug, into the arms, veins, bloodstream or body of the plaintiff, by the defendants/ numbers 1 through 3, 6 through 20, and/or their agents, as aforesaid, plaintiff was caused to lose consciousness and fall with great force and violence on and against a concrete floor, injuring his head, neck, spine, shoulders, back, buttocks, pelvis, hips, legs, ankles and feet, arms, hands, ribs and chest; that he also suffered shock and other injuries of a permanent nature; all of which caused additional serious injury, aggravation, reaggravation and damage to the heart, mind, and other vital organs of the plaintiff, and by thus rendering and leaving him permanently sick, lame, cripple or ill.

Count VI

That on or about April 12, 1966, and for some considerable period prior thereto and on numerous and divers subsequent dates; defendants numbers 4 and 5, and defendants numbers 21 through 36, did, without regard to the health, welfare or safety of potential users or recipients, wilfully, negligently or wrongfully manufacture and engage in the transshipment, facilitation, sale, delivery or distribution, for human use or consumption, within the County of Leavenworth, State of Kansas, of a certain deleterious foreign substance, vaccine, serum or drug, capable of causing death or great bodily or other serious injury to the user or recipient thereof, without attaching to the same an adequate or proper label giving notice of its dangerous or deadly qualities, and in failing to include therewith adequate directions for its proper and safe use; all of which being contrary to law and to the hurt, injury or detriment of the plaintiff.

Count VII

That on or about June 15, 1966, and on divers other dates, within the County of Leavenworth, State of Kansas, as a direct results of the use by plaintiff of a deleterious foreign substance, serum or drug, wrongfully prepared, manufactured, packaged, transhipped, sold, delivered or distribute for human use or consumption by the defendants numbers 4 and 5, and defendants numbers 21 through 36, contrary to law, as aforesaid, plaintiff was caused to lose consciousness and fall with great

force and violence on and against a concrete floor, resulting in the injuries heretofore described in Count V of this Complaint.

Count VII

That on or about May 9, 1966, and on numerous and divers subsequent dates, within the County of Leavenworth, State of Kansas, defendants numbers 37 through 44, and defendant number 1, well knowing that plaintiff was afflicted with a weak heart or cardiac disease and that plaintiff had theretofore been inoculated with a deleterious foreign substance, serum or drug, capable of producing death or great bodily or other serious injury to the user or recipient thereof, did, contrary to law and against the advice, directive or order of competent medical doctors, out of malice and with intent to cause harm or injury to plaintiff's person, wrongfully force or compel plaintiff to perform various strenuous tasks, work or exercises which caused serious injury to the heart and other vital organs of the plaintiff, and by thus rendering and leaving him permanently sick, lame, cripple or ill.

Count IX

That on or about April 12, 1966, and on numerous and divers subsequent dates, within the County of Leavenworth, State of Kansas, defendants numbers 1 and 2, and defendants numbers 6 through 20, 37 through 77, out of malice and with intent to maim or cause irreparable harm or injury to plaintiff's person, did wilfully, wantonly or wrongfully, and contrary to law, assault, batter, club, choke and torture the plaintiff, severely injuring the plaintiff and various parts and members of his body, causing him to suffer intense misery and pain and bringing him to the threshold of death, resulting in serious injury, aggravation, re-aggravation and damage to the heart, mind, and other vital organs of the plaintiff, and by thus rendering, and leaving him permanently sick, lame, cripple or ill.

Count X

That on or about April 12, 1966, and on numerous and divers dates referred to in the several counts of this Complaint, within the County of Leavenworth, State of Kansas, defendants numbers 1 and 2, having knowledge of the wrongs done as alleged in Counts I through IX of this Complaint, and having power to prevent or aid in preventing the same, neglected or refused so to do, and which the said defendants by reasonable diligence

could have prevented; thereby wrongfully contributing to the hurt, injury, detriment and damage of the plaintiff.

That by reason of the several torts alleged in Counts I through X of this Complaint the plaintiff's health has been undermined, impaired and adversely affected, as a results of which he will be required to pay medical bills or expenses for the remainder of his life to relieve him of the hurt, pain and suffering occasioned by his injuries as aforesaid; that because of the handicap of his said sick, lame, cripple or ill condition, aggravated as aforesaid, the plaintiff's earning power has been reduced to virtually zero percent; that the afore-described torts have, also, caused the plaintiff to suffer, in an aggravated form, nervous shock, physical exhaustion, complete fatigue, extreme pain and mental anguish, and other injuries of a permanent nature.

Wherefore, plaintiff demands judgment herein against each of the defendant, as follows:

1: Against defendant John T. Willingham, the sum of $555,000; and for punitive damages, the sum of $1,665,000. For a total sum of $2,220,000.

2: Against defendant C. A. Jarvis, the sum of $355,000; and for punitive damages, the sum of $710,000. For a total sum of $1,065,000.

3, 6 through 20: Against defendants The First Doe Corporation and Doe numbers 1 through 15, the sum of $225,000 from each of the said defendants; and for punitive damages, the sum of $450,000 from each of the said defendants. For a total sum of $675,000 from each of the said defendants.

4–5, 21 through 36: Against defendants The Second Doe Corporation, The Roe Company and Doe numbers 16 through 31, the sum of $750,000 from each of the said defendants; and for punitive damages, the sum of $2,250,000 from each of the said defendants. For a total sum of $3,000,000 from each of the said defendants.

37 through 44: Against defendants Doe numbers 32 through 39, the sum of $315,000 from each of the said defendants; and for punitive damages, the sum of $945,000 from each of the said defendants. For a total sum of $1,260,000 from each of the said defendants.

45 through 77: Against defendants Doe Numbers 40 through 72, the sum of $200,000 from each of the said defendants; and for punitive damages, the sum of $600,000 from each of the

said defendants. For a total sum of $800,000 from each of the said defendants.
7–25–66

(Signed) DANIEL MORGAN,
Plaintiff and Attorney for the Plaintiff.

Verification

State of Kansas,
County of Leavenworth, ss:
Subscribed and sworn to before me by Daniel Morgan this —— day of July, 1966.
A person authorized by Act of Congress to administer Oaths.

Jury Demand

Plaintiff hereby demands trial by jury on all issues of fact in the above entitled cause.

(Signed) DANIEL MORGAN,
Attorney for Plaintiff.

[Caption Omitted]

NOTICE OF REMOVAL

[Filed Aug. 26, 1966]

TO THE ABOVE-NAMED PLAINTIFF, DANIEL MORGAN:

You are hereby notified and will take notice that the defendants, John T. Willingham and C. A. Jarvis, have filed in the United States District Court for the District of Kansas, at Topeka, Kansas, their Petition for removal of an action commenced by you in the District Court of Leavenworth County, Kansas, entitled Daniel Morgan, plaintiff, vs. John T. Willingham, C. A. Jarvis, The First Doe Corporation, The Second Doe Corporation, The Roe Company, and Doe numbers 1 through 72, No. 40038 on the civil appearance docket of the District Court of Leavenworth County, Kansas, from the District Court of Leavonworth County, Kansas to the United States District Court for the District of Kansas at Topeka, Kansas; that a copy of said Petition for removal and all exhibits thereto and a

copy of the Removal Bond given by said defendants are attached hereto and made a part of this Notice of Removal, as though repeated at length herein.

NEWELL A. GEORGE,
United States Attorney.
By /S/ Elmer Hoge
ELMER HOGE,
Assistant U.S. Attorney,
District of Kansas,
P.O. Box 1537, Topeka, Kansas 66601.

CERTIFICATE OF MAILING

I, the undersigned, Elmer Hoge, Assistant United States Attorney for the District of Kansas and attorney for the defendants, John T. Willingham and C. A. Jarvis, do hereby certify that I caused a copy of the above and foregoing Notice of Removal to be mailed in a franked envelope from the United States Post Office at Topeka, Kansas, on the 25th day of August, 1966, to the above-named plaintiff, Daniel Morgan, addressed to him at P.O. Box 1000, Leavenworth, Kansas.

I do further certify that I do not know the true names, principal offices, places of business or business office addresses of the defendants, The First Doe Corporation, The Second Doe Corporation and the Roe Company, or any attorneys representing them; and I do not know the identity, place of residence or post office address of any of the defendants, Doe numbers 1 through 72 or any attorneys representing said parties.

/S/ Elmer Hoge
ELMER HOGE,
Assistant U.S. Attorney.

In the District Court of the State of Kansas
County of Leavenworth

No. 40038

DANIEL MORGAN, PLAINTIFF

v.

JOHN T. WILLINGHAM, ET AL., DEFENDANTS

To: Mr. John T. Willingham, Defendant, Warden, United States Penitentiary, Box 1000, Leavenworth, Kansas.

NOTICE AND SERVICE OF INTERROGATORIES

You will please take Notice, and Notice is hereby given, that the undersigned plaintiff has propounded and submitted certain interrogatories which you are required by law to answer under oath; and you are also required, within 15 days of the date last below written, to file your answers to said interrogatories with the clerk of the above entitled Court and to furnish the plaintiff with a full and true copy of such answers.

A full and true copy of said interrogatories, annexed hereto and made a part hereof for all purposes, is herewith served on you.

Failure to answer said interrogatories or to file your answers thereto with the clerk of Court, and to furnish the plaintiff with a full and true copy thereof, within the time designated in this Notice, may result in entry of default judgment against you in the above entitled cause.

Dated: 8–16–66

DANIEL MORGAN,
Plaintiff and Attorney for the Plaintiff.

In the District Court of the State of Kansas, County of Leavenworth

No. 40038

Daniel Morgan, PLAINTIFF

v.

John T. Willingham, ET AL., DEFENDANTS

To: Mr. John T. Willingham, Defendant, United States Penitentiary, Box 1000, Leavenworth, Kansas.

INTERROGATORIES

1. What is your full name?
2. When and where were you born?
3. (a) What is you home address?
(b) What is your business address?
4. (a) What is you occupation, trade, profession or business?
(b) Have you completed a 4-year college course?
5. By whom are you employed?
6. Who is your immediate superior and where is he located?
7. Are you also self-employed?
8. As Warden, have you executed a performance bond?
(b) If so, give the name and address of the organization or company which posted such bond?
9. How long have you been employed by the Bureau of Prisons?
10. How long have you been employed in your present position as Warden?
11. (a) What positions (naming them) have you held with the Bureau of Prisons?
(b) Describe briefly the duties you were required to perform in the several posiitons which you held with the Bureau prior to your appointment as Warden of the United States Penitentiary at Leavenworth, Kansas.
12. What are your duties, in detail, as Warden of said penitentiary?
13. Have you read the Complaint on file in this case?
14. (a) Were you continuously the Warden of said penitentiary from and after March 3, 1966, up to and including the date of your answer to this interrogatory?

(b) Did you know that, during the period mentioned in subparagraph (a) hereof, inmates of the penitentiary were inoculated with various serums, vaccines or drugs?

15. (a) Did you at anytime during your tenure as Warden authorize or permit inmates of the penitentiary, including the plaintiff, to be inoculated with various serums, vaccines or drugs?

(b) If so, give the date or dates on which you authorized or permitted inmates to be inoculated. Also give the name and address of the party or parties to which such authorization or permission was granted, and state whether the same was oral or written.

16. What were the trade names of the varous serums, vaccines or drugs used to inoculate inmates, including the plaintiff, during your tenure as Warden, and from what source were the same purchased or obtained (state the name and address of the manufacturer, seller and/or distributor)?

17. (a) Were inmates authorized, permitted or ordered to inoculate other inmates with serums, vaccines or drugs?

(b) When did you initially learn that inmates were ordered or allowed to inoculate other persons with various serums, vaccines or drugs?

(c) Did you sanction or approve such procedure or practice?

18. (a) Did you know that some of the various serums, vaccines or drugs with which inmates, including the plaintiff, had been inoculated were capable of producing death or great bodily or other serious injury to the recipient thereof?

(b) Did you know that some of the serums, vaccines or drugs used to inoculate inmates, including the plaintiff, could cause cancer?

19. (a) Prior to the actual inoculation of inmates, including the plaintiff, with various serums, vaccines or drugs did you discuss or consider with Dr. C. A. Jarvis any program dealing with the use or handling of dangerous drugs for inmates?

(b) If so, give the date of such discussion or conference; and if other persons attended the same, state their name and address?

20. (a) Did you see or inspect any of the various serums, vaccines or drugs which were used to inoculate inmates, including the plaintiff?

(b) Did you observe any label or direction accompanying such serums, vaccines or drugs with respect to its use, or which

contained a warning indicating that it was capable of producing death or great bodily or other serious injury to the recipient thereof?

21. During your tenure as Warden did you personally observe inmates being inoculated with various serums, vaccines or drugs?

22. Before answering the following interrogatories please investigate the subject matter thereof:

(a) After making investigation, do you now know that inmates did inoculate, and have been allowed to inoculate, other persons with various serums, vaccines or drugs?

(b) What are the names and numbers of the inmates whom you ascertained, after investigation, inoculated other persons with various serums, vaccines or drugs?

(c) What is the name and address of the person (or persons) who ordered or permitted inmates to inoculate other persons with various serums, vaccines or drugs?

23. (a) Is a medical record of each inmate required to be kept at the penitentiary?

(b) Do you have access to, or custody and/or control over, such medical records?

24. (a) Have you read or examined the medical record of the plaintiff?

(b) Was a portion of the plaintiff's medical record, now on file at the penitentiary, transferred to your custody by the Department of Corrections for the District of Columbia?

(c) Have you discussed the plaintiff's medical record with anyone?

(d) If so, with whom and for what reason? Also state number of times you discussed said medical record.

25. (a) Were you aware of the fact that from March through a part of July, 1966, the plaintiff was given various serums, vaccines or drugs?

(b) Were you aware of the fact that, during the period mentioned in sub-paragraph (a) hereof, the plaintiff was forced to take such serums, vaccines or drugs against his will and consent?

(c) If your answers to the interrogatories contained in sub-paragraphs (a) and (b) hereof are in the affirmative, state when you first became aware of the facts alluded to in said interrogatories.

26. (a) Did you know that the plaintiff was hospitalized on two (2) occasions during June 1966?

(b) Did you know that during May and June, 1966, the plaintiff lost consciousness and fell on concrete flooring injuring himself?

(c) If your answers to the interrogatories contained in sub-paragraph (a) and (b) are in the affirmative, when did you first learn of the facts alluded to in said interrogatories?

(d) What, if anything, did you do about the injuries which the plaintiff sustained?

27. Did you ever visit or go to see the plaintiff while he was confined in the hospital or infirmary?

28. (a) Did any of your superiors order or instruct you, either orally or in writing, to permit inmates under your care to be inoculated with various serums, vaccines or drugs?

(b) If so, from whom and on what date did you receive such order or instruction? In addition to stating such superior's official position or title, give his name and address.

29. (a) Have you transmitted a written report to your superiors setting forth your version of the facts in this case?

(b) If so, to whom and on what date did you transmit such report?

30. (a) Have you discussed this case, or your involvement herein, with any person employed by the Bureau of Prisons, or with any person employed by the Public Health Service?

31. (a) Have you discussed this case, or your involvement herein, with any member of the United States Attorney's office for the District of Kansas, or with any one else?

(b) If your answers to Interrogatory 30(a) and to the interrogatories contained in sub-paragraph (a) hereof are in the affirmative, state with whom (giving name and address), when and where and the number of times such discussion was held.

32. (a) What are the names and current address of all persons who were acting as, or held the position of Associate Warden at the penitentiary from March 1, 1966, through August 15, 1966?

(b) Opposite each name furnished indicate the specific post or station to which such person was assigned, including the date and the hours of his tour of duty.

33. (a) What are the names and current address of all persons who were acting as, or held the position of, Chief Correctional Officer, or Chief Correctional Supervisor, at the Penitentiary from March 1, 1966 through August 15, 1966?

(b) Opposite each name furnished please indicate the specific post or station to which such person was assigned, including the date and the hours of his tour of duty.

34. (a) What are the names and current address of all persons who were acting as, or held the position of, Lieutenant at the Penitentiary from March 1, 1966, through August 15, 1966?

(b) Opposite each name furnished please indicate the specific post or station to which such person was assigned, including the date and the hours of his tour of duty.

35. (a) What are the names and current address of all custodial personnel employed at the Penitentiary from March 1, 1966, through August 15, 1966? [Before answering, see Interrogatory Number 39 which modifies this interrogatory.]

(b) Opposite each name furnished please indicate the specific post or station to which such person was assigned, including the date and the hours of his tour of duty.

36. (a) What are the names and current address of all personnel employed in the "Prison Industries" at the Penitentiary from March 1, 1966, through August 15, 1966?

(b) Opposite each name furnished please indicate the specific post or stations to which such person was assigned, including the date and the hours of his tour of duty.

37. (a) What are the names and current address of all Public Health Service personnel employed at the Penitentiary from March 1, 1966, through August 15, 1966?

(b) Opposite each name furnished please indicate the specific post or station to which such person was assigned, including the date and the hours of his tour of duty.

38. (a) What are the names and current address of all personnel employed in the record and identification section at the Penitentiary from March 1, 1966, through August 15, 1966?

(b) Opposite each name furnished please indicate the specific post or station to which such person was assigned, including the date and the hours of his tour of duty. [In case of female employees use appropriate prefix of "Mrs." or "Miss."]

39. (a) Interrogatory Number 35 does not apply to custodial personnel who were employed "outside" of the inner compound of the Penitentiary or in the gun towers, on the dates in question, but applies only to custodial personnel who were assigned to the following units or stations located within the inner compound of the Penitentiary:

(1) "A" Building; (2) "C" Building; (3) Building "No. 63"; (4) "A & O" unit; (5) "Messhall & Kitchen"; (6) "Center Hall"; (7) "Captain's" and "Lieutenant's" offices; (8) "The Shake-down Crew"; (9) "The Goon Squad"; (10) "The Roving Detail"; (11) "Yardmen"; (12) "Escorts" and "inside extra duty officers"; (13) All "inside officers on special assignment status"; (14) All "inside officers on unassigned status"; (15) "The Hospital"; (16) "Receiving and Discharge" unit; (17) "[Illegible]" men.

(b) Interrogatory Number 35 applies to all personnel on all shifts or watches who were assigned to duty at the units or stations designated and described in sub-paragraph (a) thereof.

(c) With respect to furnishing the plaintiff with the date and the hours of all employee's tour of duty, such information should not include "days off" but should be confined to the period during which such employee was actually on the job or physicially present at the post or station to which he was assigned.

40. What are the names and current (or last known) address of all persons who were formerly employed at the Penitentiary from March 1, 1966, through August 15, 1966, in the several categories referred to in Interrogatories numbers 32 through 39?

41. What is the current home address of the following custodial personnel:

[Illegible]

42. (a) Did you at anytime authorize anyone to inoculate the plaintiff with an influenza, or typhoid, serum or vaccine or other virus drugs?

(b) If so, what is the name and current address of such person or persons?

(c) What was the trade name of the influenza, or typhoid, serum or vaccine, or other virus drugs, with which the plaintiff was inoculated?

(d) What is the name and address of the manufacturer, seller, dealer and/or distributor of such influenza, or typhoid, serum or vaccine, or other virus drugs?

43. On what date was the plaintiff first received at the Penitentiary?

44. During what months was the plaintiff held as a patient in the Penitentiary's hospital or infirmary?

45. Did you assign, or authorize others to assign, the plaintiff to a housing unit or cell located five (5) tiers or floors above the first floor of "A" Building?

46. Did you assign, or authorize others to assign, the plaintiff to any job, or require him to do any work, which involved any considerable physical exertion, or which involved lifting heavy objects, or which involved prolonged standing or walking?

47. (a) During your tenure as Warden, did you authorize inmates or non-medical personnel to utilize on other persons any of the medical techniques, procedures or services described below?

(1) Draw blood from various parts of the body; (2) perform surgery; (3) diagnose complaints of illness; (4) manufacture, prescribe and dispense drugs or medicine; (5) take cardiographs; (6) examine and test eyes; (7) examine ears and test hearing; (8) examine skin and test blood; (9) examine body and take x-rays; (10) perform various laboratory tests.

(b) Did you ever issue an order prohibiting inmates or non-medical personnel from performing any of the medical techniques, procedures or services numerically described in sub-paragraph (a) hereof?

48. (a) Are you now, or have you ever been, a member of the Klu Klux Klan?

(b) Are you now, or have you ever been, a member of the White Citizens' Council?

(c) Are you now, or have you ever been, a member of any anti-Negro group or organization?

(d) Do you advocate or practice the "doctrine of white supremacy"?

(e) Is it not true that as Warden you have bitterly opposed the advancement of Negroes?

49. (a) Of the total number of all personnel employed at the Penitentiary, what percent is Negro?

(b) Of the total number of all inmates confined at the Penitentiary, what percent is Negro?

(c) Do you have Negro personnel on your Classification Committee or on other administrative or policy making committees? If so, name it.

(d) Do you have Negro personnel on your staff of Correctional Supervisors holding the position of a Correctional Supervisor?

(e) Do you have Negro personnel on your "Court staff" which handles disciplinary matters and metes out punishment to inmates?

(f) Are there any Negro parole officers employed at the Penitentiary?

(g) Are there any Negro personnel employed in the Record and Identification Section at the Penitentiary?

(h) Are there any Negro Public Health Service personnel employed at the penitentiary?

(i) 1. Do you employ at the Penitentiary members of the Klu Klux Klan, the White Citizens' Council, or other persons who belong to anti-Negro groups or organizations? Do you give preference in employment to persons who are anti-Negro?

2. Do you have personnel employed at the Penitentiary who are, or were, members of the Klu Klux Klan, the White Citizens' Council, or of other anti-Negro groups or organizations?

(j) Of the total number of clerical or "white collar" jobs which you assigned to inmates, what percent is held by Negroes?

(k) Of the total number of all menial or laborious jobs which you assigned to inmates, what percent is held by Negroes?

(l) Of the total number of all disciplinary reports filed against inmates during 1966, what percent was filed against Negroes?

(m) Of the total number of all inmates who received disciplinary punishment during 1966, what percent was Negro?

(n) Of the total amount of all money disbursed among inmates as "meritorious award money" for work performed during 1966, what percent did you award to Negroes? (This does not include money disbursed among inmates employed in the "Prison Industries" created by Act of Congress.)

(o) Did you assign a guard to attend "black" muslim religious services with instructions to take down in writing, and submit to you, everything that was said and done during such services, including the sermons and other rituals of that religion?

(p) Did you likewise assign a guard to attend any non-"black"-muslim religious services for the purpose of taking its proceedings down in writing?

50. Did you have the plaintiff Daniel Morgan execute release form PHS–4573–1, or any other form of release, prior to his inoculation with various serums, vaccines or drugs?

51. (a) Do you drink alcoholic beverages?

(b) Are you an alcoholic, or addicted to the use of alcohol?

(c) Have you had to take "time off" because of "acute chronic alcoholism"?

(d) What is the present state of your health?

52. (a) Have you shown to or discussed with any person any of these interrogatories?

(b) If so, what is the name and current address of such person or persons?

53. (a) Were you on leave of absence at anytime during March, April, May, June, July or August, of 1966?

(b) If so, answer the following:

1. During the period in question, how many times were you on leave of absence?

2. What kind of leave of absence did you take?

3. What dates were you on such leave of absence?

4. What is the name and address of the person (or persons) who served as acting Warden during each such leave of absence?

54. (a) Were you physically absent from the Penitentiary on official business, or otherwise, between the hours of 7:30 A.M. to 4:00 P.M., on any day during March, April, May, June, July or August, of 1966?

(b) If so, answer the following:

1. During the period in question, how many times were you physically absent?

2. On what dates were you physically absent?

3. What is the name and address of the person (or persons) who became acting Warden during each such absence?

55. (a) Do you know the name of any person, organization, or others, who may be involved in this case which has not been mentioned in these interrogatories or in your answers thereto?

(b) If so, what is the name and current address of such person, organization, or others?

56. (a) Do you possess or have knowledge of any written report containing information relevant to this case which has not been mentioned in these interrogatories or in your answers thereto?

(b) If so, what is the title or style of such report (or reports), its date, and the name and current address of its author?

57. What is Mr. Zarter's full name, his current home address, and the position in which he is employed at the Penitentiary?

58. (a) Were you physically present within the inner compound of the Penitentiary between the hours of 7:30 A.M. to 4:00 P.M., on July 7 and July 8, 1966?

(b) If so, answer the following:

1. During the period in question, did you visit Associate Warden Harris' office (give date, number of visits made and hour of visits)?

2. During the period in question, what other places did you visit within the said inner compound (give date, places visited and number of times and hour of visits)?

3. Have you named all of the places which you visited (or went to) within the said inner compound during the period in question? If not do so now.

59. Have you answered truthfully, without purpose of evasion and to the best of your ability, all of the interrogatories hereinabove propounded and submitted to you?

In the District Court of the State of Kansas County of Leavenworth

No. 40038

DANIEL MORGAN, PLAINTIFF

v.

JOHN T. WILLINGHAM, ET AL., DEFENDANTS

PROOF OF SERVICE

Daniel Morgan, being duly sworn according to law, deposes and says:

I hereby certify that on the date last below written I served the defendant John T. Willingham with the following described documents, filed in the above entitled cause, by placing a copy of the same in the hands of the said defendant's duly authorized agent located at the United States Penitentiary at Leavenworth, Kansas:

1. "Notice and Service of Interrogatories";
2. "Interrogatories";
3. A copy of this "Proof of Service."

Further affiant sayeth not.

DANIEL MORGAN,
Affiant and Plaintiff.

Subscribed and sworn to before me this —— day of ——— 1966.

In the United States District Court for the District of Kansas

Civil Action No. T-4113

DANIEL MORGAN, PLAINTIFF

vs.

JOHN T. WILLINGHAM, C. A. JARVIS, THE FIRST DOE CORPORATION, THE SECOND DOE CORPORATION, THE ROE COMPANY, AND DOE NUMBERS 1 THROUGH 72, DEFENDANTS

Motion to Enlarge Time of Answer

[Filed Aug. 31, 1966]

Comes now the defendant, John T. Willingham, and moves the Court for an order enlarging the time to answer or object to the Interrogatories served on said defendant in the above-entitled action August 16, 1966, for the reason that James R. Ward, Assistant United States Attorney, defendant's counsel, was on vacation at the time said Interrogatories were received by the defendant and said counsel did not learn of the service of said Interrogatories on said defendant until August 29, 1966, and he has had insufficient time to review and obtain the necessary information to answer or object to the questions propounded in said Interrogatories.

NEWELL A. GEORGE,
United States Attorney.

By /s/ James R. Ward
JAMES R. WARD,
Assistant United States Attorney, District of Kansas, P.O. Box 1537, Topeka, Kansas 66601, Attorney for Defendants.

Certificate of Mailing

I, the undersigned, James R. Ward, Assistant United States Attorney for the District of Kansas and attorney for defendant John T. Willingham, do hereby certify that I caused a copy of the above and foregoing Motion to Enlarge Time Of Answer to be mailed in a franked envelope from the United States Post Office at Topeka, Kansas, on the 31st day of August, 1966, to

the above-named plaintiff, Daniel Morgan, addressed to him at P. O. Box 1000, Leavenworth, Kansas.

/s/ James R. Ward
JAMES R. WARD,
Assistant U.S. Attorney.

[Caption Omitted]

VERIFIED MOTION FOR REMAND OF ACTION TO THE DISTRICT COURT FOR LEAVENWORTH COUNTY, KANSAS

[Filed 9–2–66]

Comes now the plaintiff, Daniel Morgan, and for his verified motion for remand of the above styled cause to the District Court of Leavenworth County, Kansas, from whence it was removed by the defendants Willingham and Jarvis, and shows unto this Honorable Court as follows:

1. That on July 27, 1966, the plaintiff, suing the defendants under the laws of the State of Kansas, filed a "Verified Complaint For Damages" in the District Court for Leavenworth County, Kansas, wherein the removing defendants, John T. Willingham and C. A. Jarvis, were "jointly and severally" charged, along with 75 co-defendants, with torts committed "in their capacity as individuals or private persons." (See "Verified Complaint for Damages", page 2, on file herein.)

2. That on the same July 27, 1966, the said District Court for Leavenworth County issued summons to these removing defendants; that on July 28, 1966, the sheriff of Leavenworth County, Kansas, duly served each of the said defendants with summons along with a copy of the said complaint. (See "Summons and Return on Service of Summons" on file herein.)

3. That on August 15, 1966, the United States Attorney for the District of Kansas, filed in the said District Court of Leavenworth County what purported to be the "Answer of Defendants John T. Willingham and C. A. Jarvis", denying in general terms the accusations of the Complaint. (See "Answer of Defendant John T. Willingham and C. A. Jarvis" on file herein.)

4. That on August 16, 1966, the plaintiff served the removing defendant Willingham with copy of "Notice And Service Of Interrogatories" and accompanying "Interrogatories" with attached "Proof Of Service".

5. That the original of the said "Notice And Service Of Interrogatories" and accompanying "Interrogatories" with attached "Proof Of Service" were filed in the said District Court for Leavenworth County on August 18, 1966. (See "Notice And Service of Interrogatories", "Interrogatories" and "Proof Of Service" on file herein.)

6. That the time within which the defendant Willingham was required to file his answers to the said interrogatories expired at the close of court business on August 31, 1966.

7. That on August 25, 1966, the said defendants filed herein their "Petition For Removal Of Action To The United States District Court" from the said District Court of Leavenworth County; that contemporaneously with the filing of their removal petition the said defendants filed a surety bond with this Court in accordance with Rule 6 of the (local) Rules of Practice.

8. That in the said Complaint For Damages it is affirmatively alleged, *inter alia*, that these removing defendants, acting in concert and out of personal hatred or malice toward the plaintiff, and with intent to maim or cause irreparable harm or injury to plaintiff's person, did forcibly inoculate the plaintiff, or caused him to be inoculated, with drugs which they knew were physically harmful and unfit for human use or consumption, resulting in permanent injury to the plaintiff; that these removing defendants, acting in concert and out of personal hatred or malice toward the plaintiff, did, contrary to law, assault, batter, club, choke and torture the plaintiff bringing him to the threshold of death, inflicting serious injury, aggravation, reaggravation and damage to the heart, mind, and other vital organs of the plaintiff leaving him permanently sick and lame.

9. That these removing defendants were not employed nor were they under any obligation or duty to the United States to commit any of the several torts alleged against them in the Complaint.

10. That the said defendants were not acting in the regular or normal course of their employment, or in the performance of their official duties, as officers of the United States at the time they were engaged in and committed the several torts alleged against them in the Complaint, rather they were thus engaged as common or equal partners on a *frolic* of their own which had no relevancy to their official duties as employees or officers of the United States.

11. That not only are these removing defendants personally liable to the plaintiff under the laws of the State of Kansas for their deadly assaults, batteries, tortures and malpractices inflicted against him, but they are also criminally liable for their alleged misdeeds.

12. *That the allegations of the verified Complaint amply describe these removing defendants to be common tort feasors acting far beyond the scope of their lawful authority.*

13. That for the foregoing reasons these removing defendants do not come within the purview of Title 28 United States Code, Section 1442(a)(1), and they are, therefore, not entitled to the removal provisions thereof.

14. (a) That these removing defendants have dealt with and know the identity or true names of each and all of the persons referred to as their co-defendants in the said Complaint and in the above styled cause.

(b) That the plaintiff has sought by interrogatories, duly propounded to the defendant Willingham, to learn the true identity of the several Doe defendants herein so that he may amend the Complaint "to include therein such persons' true name or identity whenever the same is discovered." (See Complaint, page 2.) To date, the defendant Willingham has not seen fit to answer any of the said interrogatories.

15. That this motion is made and based on the files, papers, proceedings and records heretofore obtained in the District Court for Leavenworth, Kansas, in the case of "Daniel Morgan, plaintiff, vs., John T. Willingham, C. A. Jarvis, et al., No. 40038", as well as the files and records of this Court in the above styled cause.

Wherefore, in consideration of the premises, the plaintiff respectfully moves this Honorable Court to remand this cause to the District Court of Leavenworth County, Kansas, and that no further proceedings be had in said cause in the United States District Court for the District of Kansas; that the plaintiff be allowed his costs for the improper removal of said cause.

Dated: 8-31-66

/s/ Daniel Morgan
DANIEL MORGAN,
Movant and Attorney for Movant.

AFFIDAVIT

STATE OF KANSAS,
County of Leavenworth, ss:

Daniel Morgan, being first duly sworn according to law, deposes and says:

That he is the person named as the plaintiff in the above styled cause and as such is the movant in the foregoing and annexed motion for remand; that he has read the said motion for remand and is acquainted with and understands the contents there; and that all the allegations, statements and averments therein continued are true and correct.

Further affiant sayeth not.

DANIEL MORGAN,
Affiant.

Subscribed and sworn to before me this 31st day of August, 1966.

Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

A. T. MILLER, *Class. & Parole.*

[Caption Omitted]

VERIFIED MOTION FOR ORDER COMPELLING ANSWERS TO INTERROGATORIES, OR, IN THE ALTERNATIVE, FOR JUDGMENT BY DEFAULT

[Filed Sep. 14, 1966]

Comes now the plaintiff, Daniel Morgan, and for his verified motion for an order compelling answers to interrogatories, or, in the alternative, for judgment by default, and shows unto this Honorable Court as follows:

1. That on July 27, 1966, plaintiff filed a Complaint For Damages against the defendant John T. Willingham, and others, in the District Court for Leavenworth County, Kansas, wherein the above styled cause was lately pending.

2. That on August 15, 1966, Newell A. George, United States Attorney for the District of Kansas, by James R. Ward, Assistant United States Attorney for the District of Kansas, filed an Answer to the said Complaint in the said District Court for Leavenworth County, ostensibly on behalf of the defendants John T. Willingham and C. A. Jarvis.

3. That on August 16, 1966, plaintiff served the defendant Willingham with "Notice and Service of Interrogatories", a

copy of the "Interrogatories" and attached "Proof of Service" in the above styled cause.

4. That on August 18, 1966, originals of the documents mentioned in paragraph 3 hereof were filed by the plaintiff in the said District Court for Leavenworth County in said cause.

5. That on August 25, 1966, Newell A. George and Elmer Hoge, Assistant United States Attorney for the District of Kansas, filed, in this Court in the above styled cause, their appearance as counsel of record for the defendants John T. Willingham and C. A. Jarvis.

6. That on the same August 25, 1966, the defendant Willingham, through the said Newell A. George, by the said Elmer Hoge, filed herein his petition for removal of said cause from the District Court for Leavenworth County, Kansas, to this Court for trial, accompanied by the removal bond required pursuant to 28 U.S.C. 1446(d) and in accordance with Rule 6 of the Rules of Practice of this Court.

7. That on August 26, 1966, the defendant Willingham, through the said Newell A. George, by the said Elmer Hoge, filed, in this Court in the above styled cause, notice of said petition for removal; that a certified copy of said petition for removal of said cause was filed in the said District Court for Leavenworth County, and the clerk thereof issued a "Certificate of Removal."

8. That on August 30, 1966, plaintiff received, from the said Newell A. George, by the said Elmer Hoge, both a copy of said notice of removal and petition for removal of said cause, as well as a copy of "Entry of Appearance as counsel for defendants" Willingham and Jarvis.

9. That on August 31, 1966, the defendant Willingham, through the said Newell A. George, by James R. Ward, Assistant United States Attorney for the District of Kansas, filed, in this Court in the above styled cause, a "Motion to enlarge time of Answer", requesting "an order enlarging the time to answer or object to the interrogatories served on said defendant (Willingham) in the above-entitled action August 16, 1966", upon the ground "that James Ward, Assistant United States Attorney, defendant's counsel, was on vacation at the time said interrogatories were received by the defendant and said counsel did not learn of the service of said interrogatories on said defendant until August 29, 1966, and he has had insufficient time to review and obtain the necessary information to answer or object to the questions propounded in said interrogatories."

(On September 6, 1966, at approximately 3 p.m., a prison guard came to the solitary punishment cell wherein petitioner has been interred ever since July 8, 1966 and handed him an envelope from the clerk of Court which contained this Court's "Motion Calendar" for September 9, 1966. Among the 31 cases appearing on said "Motion Calendar", defendant's motion to enlarge time was number 31. Because of his confinement in the United States Penitentiary at Leavenworth, Kansas, plaintiff was unable to present himself before this Court for oral argument. He, therefore, has no knowledge of what transpired herein on September 9, 1966.)

10. That on September 2, 1966, plaintiff filed, in this Court in the above styled cause, a "Notice of Motion for Remand" and "Verified Motion for Remand of Action to the District Court for Leavenworth County, Kansas" for trial, accompanied by an appropriate "Certificate of Mailing."

11. That on September 6, 1966, plaintiff filed, in this Court in the above styled cause, his "Opposition to Motion to Enlarge Time of Answer", accompanied by an appropriate "Certificate of Mailing."

12. That the plaintiff has sought, unavailingly, by said interrogatories, duly propounded to the defendant Willingham, to learn the true names or identity of the numerous "Doe" defendants so that he may amend the Complaint "to include therein such persons' true name or identity whenever the same is discovered. (See page 2 of Complaint; *Cf.* pp. 813 of Interrogatories on file herein.)

13. That said Complaint names 75 persons as "Doe" defendants in this cause whose true names or identity are unknown to the plaintiff; that said Complaint alleges that the defendants Willingham and Jarvis have had dealings with each and all of the said "Doe" defendants. (See pp. 210 of said Complaint of file herein.)

14. That under the applicable rules the time within which the defendant Willingham was required to file his answers herein to said interrogatories expired on August 31, 1966.

15. That the plaintiff is entitled to prompt discovery; and where, as here, the identity of so many "Doe" defendants remains undetermined prompt discovery is not only desirable but is essential to the due and orderly administration of justice.

16. That prior to the initiation of this lawsuit, plaintiff filed in this Court on July 7, 1966, in the case of *Morgan* v. *Hamburger, et al.*, Civil Action No. T–4050, a "Petition For Con-

tempt Citation" against the defendant Willingham (which is still unheard and pending in this Court) in which it is, among other things, alleged, under oath, that said defendant Willingham ". . . did, deliberately and wrongfully, obstruct, frustrate, impair and interfere with the orderly prosecution of litigation, and of a party-litigant, in a matter pending before the Court in the above entitled cause . . ." and that "On July 8, 1966, Mr. Willingham removed the plaintiff from the general population of the prison and placed him in solitary or restricted confinement . . . and by thus preventing him from examining witnesses and from pursuing such other federal pretrial procedures as are necessary to the fair and proper prosecution of said cause . . . (and) by seizing evidence vital to the prosecution of said cause from plaintiff's locker and confiscating the same . . . (and) By intimidation of persons whom the plaintiff intends to present as his witnesses during the hearing and/or trial of said cause . . . (and) By intimidation, coercion and punishment of the plaintiff for the purpose of compelling him to abandon the prosecution of said cause . . . (and seizing) Separate medical statements or reports signed by doctors Phillips, Robinette, Lavine, Clark, Balkissoon and Overhulser, including an affidavit by Dr. Benjamin F. Phillips, all pertaining to the plaintiff's heart disease . . . (and seizing) A list containing the names of witnesses, prospective witnesses and other persons, to be interviewed, and of documents to be examined, in connection with the above entitled cause . . . (and seizing) Plaintiff's diary containing dates and factual account of events pertaining to the above entitled cause, and upon which this affiant (plaintiff here) must depend for the proper or effective preparation and prosecution of his cause of action herein . . . (and) Persons who previously informed the plaintiff of their willingness to testify in support of the prosecution in the above entitled cause now decline to do so, stating that they have been threatened by Mr. Willingham with reprisal . . . (and that) Just recently Mr. Willingham boasted that he was a part of the power structure and that this Court would accept his word over that of this affiant, and that after all the court hearings were over the affiant would still 'rot' in solitary or restricted confinement unless he abandoned prosecution of the above entitled cause." (See "Petition For Contempt Citation" in *Morgan* v. *Hamburger, supra.*)

17. That the defendant Willingham has already consumed one-fourth of the *unconditional* time permitted by Rule 14 of

this Court for completion of pre-trial discovery procedures (which is twice the period allowable for filing answers under the Federal Rules of Civil Procedure) and still he has not disclosed the identity or names of his "Doe" co-defendants.

18. That plaintiff believes, and is reasonably certain, that he will be required to propound interrogatories to or take the depositions of a substantial number of the "Doe" defendants whenever their names are discovered.

19. That the defendant's "Motion to Enlarge Time of Answer" is unjustifiably dilatory and obviously was designed to absorb the *unconditional* 4-month period permitted for completion of pre-trial discovery procedures, and to otherwise affect the substance of the defendant's answers to the pending interrogatories; that as a results of the defendant's dilatory tactics herein the plaintiff may be impelled to propound additional or supplemental interrogatories to the defendant Willingham.

20. That the defendant's failure or refusal to file, or to timely file, his anwsers to the said interrogatories may be directly attributed to his own wilful conduct and truly reflects his utter contempt for the judicial process of this Court and for the due administration of justice.

21. That unless and until the defendant Willingham reveals the identity or names of his "Doe" co-defendants the prosecution of this lawsuit will be stymied thus thwarting the due administration of justice in this case.

22. That the instant motion is also made and based on all the files, papers, proceedings and records heretofore obtained and now of record in this Court in the above styled cause.

Wherefore, in consideration of the premises, the plaintiff respectfully moves this Honorable Court for entry of a forthwith order herein directing and compelling the defendant John T. Willingham to answer instanter, and without objection, each and every interrogatory served on him on August 16, 1966, in the above styled cause, or, in the alternative, for entry of judgment by default herein against the said defendant Willingham.

Dated: 9–12–66.

/S/ DANIEL MORGAN,
Movant and Plaintiff,
Attorney For Movant And Plaintiff.

AFFIDAVIT

STATE OF KANSAS
County of Leavenworth, ss:

Daniel Morgan, being first duly sworn according to law, deposes and says:

That he is the person named as the plaintiff in the above styled cause and as such is the movant in the foregoing and annexed motion for order compelling answers to interrogatories, or, in the alternative, for judgment by default; that he has read the said motion and is acquainted with and understands the contents thereof; and that all the allegations, statements and averments therein contained are true and correct.

Further affiant sayeth not.

/S/ DANIEL MORGAN.

Subscribed and sworn to before me this —— day of September A.D. 1966.

[Caption Omitted]

NOTICE OF MOTION FOR ORDER COMPELLING ANSWERS, OR, IN THE ALTERNATIVE FOR JUDGMENT BY DEFAULT

[Filed Sep 14, 1966]

To: John T. Willingham, Defendant.

Please take Notice that the undersigned has filed in the United States District Court For The District of Kansas, at Topeka, Kansas, a motion for an order compelling answers to interrogatories, or, in the alternative, for judgment by default, in the above styled cause; that a copy of said motion for order compelling answers, or, in the alternative, for judgment by default is annexed hereto and made a part hereof as though fully set forth at length herein.

Dated 9–12–66.

/S/ DANIEL MORGAN,
Attorney for Plaintiff.

CERTIFICATE OF MAILING

I, the undersigned, Daniel Morgan, plaintiff and Attorney for the plaintiff, do hereby certify that I caused a copy of the foregoing annexed Notice of Motion For Order Compelling Answers, Or, In The Alternative, For Judgment By Default

to be mailed in a franked envelope from the United States Penitentiary at Leavenworth, Kansas, on September —— 1966, to Newell A. George, United States Attorney for the District of Kansas, directed to the attention of Elmer Hoge, Assistant United States Attorney for the District of Kansas, Attorneys for the above named defendant, at their address P.O. Box 1537, Topeka, Kansas 66601.

/S/ DANIEL MORGAN,
Attorney for Plaintiff.

[Caption Omitted]

MOTION FOR SUMMARY JUDGMENT

[Filed Oct. 7, 1966]

Come now the defendants in the above-entitled action, John T. Willingham, Warden of United States Penitentiary, Leavenworth, Kansas; and C. A. Jarvis, M.D., and move for summary judgment in favor of said defendants as to all of the allegations contained in plaintiff's pleadings on the grounds that as revealed by all of the pleadings and evidence in the above-entitled case, the defendants were and are immune from suit.

NEWELL A. GEORGE,
United States Attorney.
/S/ James R. Ward
JAMES R. WARD,
Assistant United States Attorney, Post Office Box 1537, Topeka, Kansas 66601, Attorney for Defendants.

CERTIFICATE OF MAILING

I do hereby certify that I mailed a copy of the above and foregoing Motion for Summary Judgment to Daniel Morgan, United States Penitentiary, Leavenworth, Kansas 66048, this 7th day of October, 1966.

/S/ James R. Ward
JAMES R. WARD,
Assistant United States Attorney.

CLERK'S NOTE

October 14, 1966:

At Topeka, Templar-J:

Defts' motion for enlargement of time to answer or object to interrogatories—passed.

Defts' motion for summary judgment—passed.

Pltf's motion to remand—taken under advisement.

Pltf's motion for order compelling answer to interrogatories or in alternative for judgment by default—passed.

Counter designation: Pltf—Kansas City; Deft—Topeka—passed.

Pltf's oral motion to dismiss Ct. 1, 2, 3, 8, 10—sustained.

[Caption Omitted]

RULING ON PLAINTIFF'S MOTION TO REMAND

[Filed Oct. 5, 1966]

On July 27, 1966 plaintiff brought an action against defendants John T. Willingham and C. A. Jarvis jointly and severally charging them along with seventy-five co-defendants with torts committed "in their capacity as individuals or private persons" the verified complaint filed in the State District Court for Leavenworth County, Kansas contained ten separate counts.

On August 15, 1966 an answer was filed by the United States Attorney for the District of Kansas in the Leavenworth County State Court which purported to be an answer of defendants John T. Willingham and C. A. Jarvis denying in general terms the charges and accusations of the complaint. This answer consisted of what might be termed a general denial.

On August 25, 1966 the defendants Willingham and Jarvis filed in this Court their petition for removal of action to the United States District Court from the State District Court of Leavenworth County, Kansas. An appropriate bond for removal was approved and filed and the matter was removed to this Court in the manner prescribed by law.

Thereafter and on September 2, 1966, plaintiff herein filed a motion to remand the action to the State Court from which it had been removed.

Upon hearing before this Court the plaintiff requested leave to dismiss Counts 1, 2, 3, 8 and 10 of his original verified complaint. The Court sustained this motion and there remains for consideration before the Court the claims and charges

asserted in Counts 4, 5, 6, 7 and 9. Count 4 of the complaint charges in substance that defendant ordered and utilized penitentiary inmates and other persons not qualified to administer dangerous drugs to him and to practice medicine in the State of Kansas and to innoculate him with deleterious foreign substances, serum or drugs resulting in his permanent injury; in Count 5 plaintiff charges that as a result of the injection of serum or drug into his body by defendants he was caused to lose consciousness, fall to the concrete floor and injure his head and various parts of his body; in Count 6 plaintiff charges defendants with negligently and wrongfully manufacturing and engaging in the transshipment, facilitation, sale, delivery or distribution, for human use or consumption, certain deleterious foreign substances, vaccines, serums or drugs capable of causing death or serious injury to the user or recipient without attaching to the same an adequate or proper label giving notice of its dangerous or deadly qualities, and failing to include adequate directions for its proper use, all of which caused injury and hurt to the plaintiff; Count 7 charges that as a direct result of the use of such drugs and serums, the plaintiff was caused to lose consciousness and fall to a concrete floor and as a result suffered the injuries described in Count 5; in Count 9 the defendants are charged with wilfully, wantonly and wrongfully and contrary to law, assaulting, battering, choking and torturing the plaintiff, and severely injuring him in various parts of his body.

In their petition for removal the defendants assert that the defendant Willingham is and was at all times pertinent the Warden of the United States Penitentiary at Leavenworth, Kansas in which place plaintiff was confined by a lawful judicial judgment; that the defendant C. A. Jarvis is and was at all time pertinent an employee of the United States Public Health Service assigned to the United States Penitentiary at Leavenworth, Kansas, and as such was an officer of the United States and a person acting under officers of the United States; that any act or thing that the defendants or either of them may have done or authorized to be done concerning the plaintiff as is alleged in his complaint, was done and made by them in the course of their duties as officers of the United States and as persons acting under officers of the United States and under color of such officers and by virtue thereof; that pursuant to the provisions of Title 28 United States Code § 1442(a)(1) peti-

tioners are entitled to have the cause removed to the United States District Court for the District of Kansas. The defendants further assert in their petition for removal that they do not know the identity of any of the persons referred to as First Doe Corporation, Second Doe Corporation, and Roe Company and Doe numbers 1 through 72, as co-defendants with them.

The Court has reviewed authorities cited by the plaintiff in support of his contentions that this is an action brought against the defendants personally and not against them as officers of the United States, and that they are personally liable to him for their tortuous acts committed as individuals with malice and purposely. That defendants would be personally liable to plaintiff in the State of Kansas under such circumstances can scarcely be questioned. See *Farmer* v. *Rutherford*, 136 Kan. 298, 15 P. 2d 474.

Though this is the law of Kansas, the defendants here seek to remove the action brought against them under the provisions of Section 1442, Title 28 U.S.C. Section (a)(1) provides that:

> "Any officer of the United States or any agency thereof or person acting under him for any act under color of such office or on account of any right, title or authority claimed under any Acts of Congress for the apprehension or punishment of criminals or the collection of the revenue."

An examination of the authorities reveal that under the Removal Statute, 28 U.S.C. § 1441, before a case can be removed it is necessary for the facts upon which the removal is based to appear on the face of the complaint or subsequent amendments thereto, filed by thes plaintiff. *Romick* v. *Beckins*, 197 F. 2d 369. This is because the action may be removed under Section 1441 only where it is one over which the federal courts would have original jurisdiction in the first instance. But this rule does not apply where a defense is asserted based upon a federal right of removal granted under the provisions of 28 U.S.C. § 1442(a)(1) under which the removal of this case was sought and obtained. The removal in this case is based on federal interest in the matter, the facts underlying which may be stated in the removal petition itself, and from it determined whether or no federal jurisdiction existed over the claim as stated in the complaint as originally filed and served.

Where a federal officer asserts a privilege for acts done under color of his office, the defense is based upon a federal right, the

purpose of which is to prevent federal employees from being unduly harassed by vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities. *Barr* v. *Matteo*, 360 U.S. 564. The federal government has a special interest in such matters which justifies the granting or removal jurisdictions to the federal court in such cases. Congress has not in Section 1442, as in Section 1441, required that the case be one over which the Court have original jurisdiction in order for the defendant to obtain removal. In the revision of Title 28 United States Code Act of June 25, 1948, c. 686, 52 Stat. 938, the right of removal was extended to apply to all officers and employees of the United States or any agency thereof. See Reviser's note 28 U.S.C.A. § 1442. As the case now stands before the Court, the motion to remand must be denied. Necessarily if, upon hearing of the case, it should develop that the acts of the defendants though allegedly done by them while acting under color of their office, were not so committed, then the Court, upon a renewal of plaintiff's motion to remand, would further consider it.

The Court is aware, as plaintiff urges, that the government is not liable for the intentional torts of its employees, 28 U.S.C. § 2680(h), but where the issue is raised by proper and sufficient allegations in the petition for removal as here, that whatever acts were done by the defendants or either of them, were acts required of them in performance of their responsibilities and duties as public officers and performed under color of such office, then the action becomes removable and the issue presented to this Court for determination. The case of *United States* v. *Muniz*, 374 U.S. 150, an examination of this decision reveals that it was an action maintained by a federal prisoner under the Federal Tort Claims Act to recover damages he suffered for personal injuries sustained by him during confinement in a federal prison and resulting from negligence of a government employee. The Court simply held that such an action is maintainable. This is no authority for the contentions advanced by plaintiff here.

The right of removal of this cause, is sustained under the pleadings by *Jones* v. *McGill*, 46 F. 2d 334, and *Poss* v. *Lieberman*, 299 F. 2d 358.

In cases removed under Section 1442 of the statute it is not necessary that all of the parties defendant join in the petition for removal. A single federal officer may obtain removal and

this ends the power of the State Court to issue process because the entire case comes to the jurisdiction of the Federal Court. See *Allman* v. *Hanley*, 302 F. 2d 559.

It follows that plaintiff's motion to remand this cause to the State Court must be and is hereby overruled and denied.

There remains for the Court's consideration in this matter the motion of the defendants Willingham and Jarvis for summary judgment. Plaintiff was granted fifteen days from October 13, 1966 to file answer to the government's brief, after which the Court will rule upon such motion.

DATED at Topeka, Kansas this 18th day of October, 1966.

/S/ GEORGE TEMPLAR,
United States District Judge.

[Caption Omitted]

AFFIDAVIT OF JOHN T. WILLINGHAM IN SUPPORT OF MOTION FOR SUMMARY JUDGEMENT

[Filed Oct. 21, 1966]

STATE OF KANSAS,
Leavenworth County, ss:

JOHN T. WILLINGHAM, of lawful age, being first duly sworn upon oath, deposes and says:

That he is one of the defendants in the above entitled action. That he is Warden of the United State Penitentiary, Leavenworth, Kansas, and is employed by the Department of Justice, Bureau of Prisons, and has a Civil Service rating of GS–16. He has been employed by the Bureau of Prisons, Department of Justice, for a period of twenty-seven years. On January 19, 1965, he became the top field executive administrator and Warden of the United States Penitentiary, Leavenworth, Kansas. As the Warden, he is in complete charge and totally responsible for directing all activities of said Penitentiary designed for the safekeeping, rehabilitation and reformation through training and treatment of male prisoners considered to be habitual or professional criminals requiring maximum supervision in the most secured custodial housing facilities. The institution is divided into two components. The main institution contains twenty-two acres within the walled area of the Penitentiary surrounded by an adjoining 975 acres of farm land. The second component is a farm camp located across the Missouri River some three miles from the institution on an additional 809 acres

of farm land. At these locations are housed a total of 2,059 inmates. These prisoners are committed to serve sentences ranging from one year and one day to natural life.

As the highest field executive, he exercises responsibility for administrative and organizational control over the functions of three major or organizational divisions:

a. Bureau of Prisons—providing staff facilities, supplies and equipment for incarceration, physical necessities, correctional and rehabilitative treatment of prisoners.

b. Federal Prison Industries, Inc.—a self-supporting, government-owned corporation operating industrial and manufacturing activities, providing employment and training for prisoners and producing articles and commodities or rendering services on a basis comparable to private industry.

c. Public Health Service—providing medical and psychiatric diagnoses, treatment and hospital facilities for prisoners. Professional medical staff and technicians are detailed by U.S. Public Health Service.

Under general administrative direction of the Director, Bureau of Prisons, full authority and responsibility has been delegated to carry out directives of the Federal Courts and the Attorney General; for planning, directing and coordinating institutional programs covering very broad, diverse and complex phases of security discipline and rehabilitative treatment of prisoners; for administrative direction of personnel, fiscal and business management functions of the institution, including organizational control over Federal Prison Industries. Within the framework of broad functional and treatment policies of the Bureau of Prisons, the Warden establishes and carries into effect policies governing all institutional operations, conduct and discipline of both prisoners and employees. By delegation of authority to staff administrative officials, he establishes responsibilities for each institutional position and maintains administrative control.

As Warden, he

1. Plans, directs and coordinates broad and varied inmate training, rehabilitation, disciplinary and work progams, extending into every function and service of the institution.

2. Reviews security plans and procedures, directs their preparation and/or modification to assure prisoner detention and control. Makes frequent and regular inspections of all areas to appraise the progress and effectiveness of programs and policies.

3. Administers the several institutional departments, integrates and coordinates them toward the achievement of major goals.

4. Directs a staff of approximately 417 employees in a wide variety of professional, industrial and occupational functions and services necessary to provide the care custody and treatment of prisoners; to operate and maintain the physical plant and facilities including extensive farming operations and manufacturing enterprises, and to furnish administrative, business, fiscal and personnel services and property management.

5. Administers an institutional budget aggregating $3,500,000.00 annually. Initiates special repair and improvement projects, approves contracts and accounts for the utilization and expenditure of resources. Administers the trusteeship responsibility of the government for personal funds of prisoners confined in the institution.

Plaintiff, Daniel Morgan, is an inmate at the United States Penitentiary, Leavenworth, Kansas, and was received at that institution March 17, 1966. That the only contact that said John T. Willingham has had with said Daniel Morgan has been inside the walls of the United States Penitentiary, Leavenworth, Kansas, and in performance of John T. Willingham's official duties as Warden of said institution.

JOHN T. WILLINGHAM.

SUBSCRIBED and SWORN to before me, this 21st day of October, 1966.

/S/ CARL F. ZARTER,
Administrative Assistant,
Classification & Parole.

CERTIFICATE OF MAILING

I do hereby certify that I mailed a copy of the above and foregoing Affidavit of John T. Willingham in Support of Motion for Summary Judgment to Daniel Morgan, United States Penitentiary, Leavenworth, Kansas, 66048, this 24th day of October, 1966.

/S/ James R. Ward
JAMES R. WARD,
Assistant United States Attorney, District of Kansas, P.O. Box 1537, Topeka, Kansas 66601, Attorney for Defendants.

[Caption Omitted]

AFFIDAVIT OF C. A. JARVIS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

[Filed Oct. 24, 1966]

STATE OF KANSAS,
Leavenworth County, ss:

C. A. JARVIS, being first duly sworn upon oath and being of lawful age, deposes and says:

That he is one of the defendants in the above entitled action, and that his true name is Charles A. Jarvis, M.D., age 41 years; that he graduated from the Medical School of the Johns Hopkins University, receiving a degree of M.D. therefrom in 1948; that from 1948 to the present he has been employed as a Medical Director, U.S. Public Health Service, and for the last five years has been assigned to the United States Department of Justice, Bureau of Prisons, at Leavenworth, Kansas. Since July 1965 he has been Chief Medical Officer at the United States Penitentiary, Leavenworth, Kansas.

As such he is in charge of the hospital located within the United States Penitentiary, Leavenworth, Kansas, and is responsible for the medical care and treatment of 2059 inmates and 417 employees at such institution.

He is an active practicing surgeon and diagnoses and treats surgical cases at said institution. As the Chief Medical Officer, he has overall administrative responsibility for the conduct of the prison hospital and the medical care and treatment of the inmates and employees. His responsibilities include the promulgation of rules and guidelines for the operation of the prison hospital and the supervision of the medical staff consisting of three physicians, two dentists, and one clinical psychologist, seven medical technical assistants and 65 inmates employed as nurses, clerks, technicians and orderlies.

He has responsibility for determining the need for and suitability of all types of drugs and medicines used at said institution, the purchasing of the same, as well as the administration of such drugs and medicines.

He is the Chairman of the Administrative Staff Meetings at said hospital, as well as the Chairman of the Clinical and Pathological Meetings held each month with the medical staff thereof.

The plaintiff, Daniel Morgan, was received at the United States Penitentiary, Leavenworth, Kansas, March 17, 1966. The only contact the said C. A. Jarvis has had with Daniel Morgan has been at the prison hospital in the United States Penitentiary, Leavenworth, Kansas, and only in the performance of said C. A. Jarvis' duties as Chief Medical Officer and only with regard to medical care and treatment, diagnoses and routine physical examination.

/S/ C. A. Jarvis
C. A. JARVIS.

SUBSCRIBED and SWORN to before me, this 21st day of October, 1966.

/S/ CARL F. ZARTER,
Administrative Assistant,
Classification & Parole.

CERTIFICATE OF MAILING

I do hereby certify that I mailed a copy of the above and foregoing Affidavit of C. A. Jarvis in Support of Motion for Summary Judgment to Daniel Morgan, United States Penitentiary, Leavenworth, Kansas, 55048, this 24th day of October, 1966.

/S/ James R. Ward
JAMES R. WARD,
Assistant United States Attorney, District of Kansas, Post Office Box 1537, Topeka, Kansas 66601, Attorney for Defendants.

[Caption Omitted]

VERIFIED OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Filed 11-3-66]

The plaintiff, Daniel Morgan, respectfully opposes the motion for summary judgment, made and interposed by counsel for the defendants Willingham and Jarvis, says and alleges:

A

That the moving defendants are positively not immune from liability in this lawsuit by reason of the following facts:

1. *That whatever immunity said defendants ostensibly possessed was waived pursuant to their failure to timely and properly assert the same.*

2. *That although said defendants were employed at the United States Penitentiary, Leavenworth, Kansas, they were not acting within the course and scope of their employment, or in performance of any official duty, or in exercise of any rightful or lawful authority, as employees of the United States, at the time the acts complained of in this lawsuit were perpetrated by them.*

3. *That said defendants acted beyond, and outside, the outer perimeter of their line of duty, as employees of the United States, at the time the acts complained of in this lawsuit were perpetrated by them.*

4. That the acts complained of in this lawsuit were perpetrated by said defendants in violation of and contrary to the terms, requirements, orders, instructions, regulations and conditions of their employment, duty and authority as promulgated by the Attorney General of the United States.

5. That the acts complained of in this lawsuit were perpetrated by said defendants in violation of and contrary to the laws of the State of Kansas and of the United States.

6. *That the perpetration of the acts complained of in this lawsuit had no relevancy to said defendants' employment, duty or authority as officers or employees of the United States or as persons acting under officers of the United States.*

B

1. That at all times pertinent to the case, the plaintiff was not engaged or involved in the act of escaping, plotting or attempting to escape, or in assaulting, attacking or injuring or attempting to assault, attack or injure any person, or in abusing or attempting to abuse any person, or in destroying or attempting to destroy property, or in breaching or attempting to breach any law, or in breaching or attempting to breach the peace, or in violating or attempting to violate any rule of the prison.

2. That at all times pertinent to the case, the plaintiff did nothing whatsoever to cause or provoke, warrant or justify the personal attacks or private torts of these defendants, as alleged in the verified complaint filed in this lawsuit.

C

1. That the acts complained of in this lawsuit were perpetrated by said defendants out of personal hatred and private malice, completely unconnected with their lawful employment, duty, authority or responsibility as officers or employees of the United States.

2. *That the acts complained of in this lawsuit were perpetrated by said defendants while they were on a private excursion, frolic or venture of their own, exclusively designed for their own personal gratification and self-interest, in reckless disregard of the life and limb of the plaintiff and in defiance of law.*

3. *That the acts complained of in this lawsuit were perpetrated by said defendants under the stimulus or influence, and as a result of imbition or ingestion by them, of alcohol or other intoxicants.*

D

This opposition to defendants' motion for summary judgment is also *made and based on the verified complaint for damages, heretofore filed herein, and on all the files, papers, affidavits,* interrogatories, subpenas, records, exhibits, pleadings, motions, petitions, testimony and proceedings heretofore, or which hereafter may be had and obtained in said case; *all and each of which are, by this reference, made a part of this opposition to defendants' motion for summary judgment, as though repeated at length herein.*

E

CONCLUSION

For the foregoing reasons it is submitted that the defendants' motion for summary judgment should be summarily denied.

Respectfully submitted,

/S/ DANIEL MORGAN,
Plaintiff and Attorney for the plaintiff.

AFFIDAVIT

STATE OF KANSAS
County of Leavenworth, ss:

Daniel Morgan, having been first duly sworn according to law, upon his oath says and depoes:

That he is the person named as the plaintiff in the above styled case and as such is the opposing party in the foregoing and annexed "Opposition to defendants' Motion For Summary Judgment"; that he has read said "Opposition to defendants' Motion For Summary Judgment" and is acquainted with and understands the contents thereof; and that all the allegations, statements and averments therein contained are true and correct to the best of his knowledge and belief.

Further affiant sayeth not.

_____

Affiant and Plaintiff.

Subscribed and sworn to before me by the above-named Daniel Morgan, affiant, at my office in the United States Penitentiary at Leavenworth, Kansas, this —— day of ————, 1966.

_____.

[Caption Ommitted]

Memorandum of Decision

SUSTAINING MOTION OF DEFENDANTS WILLINGHAM AND JARVIS FOR SUMMARY JUDGMENT

[Filed Dec. 14, 1966]

The files and records of this case disclose that on July 27, 1966 plaintiff brought an action against defendants John T. Willingham and C. A. Jarvis jointly and severally charging them, together with 75 co-defendants for tort committed "in their capacity as individuals or private persons". The verified complaint filed in the state district court for Leavenworth County, Kansas contains ten separate counts.

On August 15, 1966 a pleading was filed by the United States Attorney for the District of Kansas in the Leavenworth County State Court which purported to be an answer for the defendants John T. Willingham and C. A. Jarvis, which answer denied in general terms the charges and accusations contained in the complaint. The answer consisted of what might properly be termed a general denial.

On August 25, 1966 defendants Willingham and Jarvis filed in this Court their petition for removal of the action from the State Court to this Court. This Court considered the motion of plaintiff to remand the case to the District Court of Leaven-

worth County, Kansas and on October 18, 1966 that motion was denied and this Court retained jurisdiction of the case.

In the meantime defendants John T. Willingham as Warden of the United States Penitentiary at Leavenworth, Kansas, and C. A. Jarvis as Chief Medical Officer of that institution filed their joint motion for summary judgment in favor of defendants and against plaintiff on the grounds that all of the allegations contained in the plaintiff's pleadings and evidence in the record of the above entitled case discloses that defendants were and are immune from suit of the kind and nature alleged in plaintiff's complaint against them.

The suit as instituted by plaintiff originally contained ten counts. Plaintiff requested leave to dismiss Count 1, 2, 3, 8 and 10, which leave was granted by the Court and those Counts were dismissed. There remains for the Court's consideration the claims and charges asserted by plaintiff in Counts 4, 5, 6, 7 and 9 of the complaint. Count 4 of the complaint charges in substance that defendants ordered and utilized penitentiary inmates and other persons not qualified, to administer dangerous drugs to him and to practice medicine in the State of Kansas, and to inoculate him with deleterious foreign substances, serum or drugs resulting in his permanent injury; in Count 5 plaintiff charges that as a result of the injection of serum or drug into his body by defendants that he was caused to lose consciousness, fall to the concrete floor and injure his head and various parts of his body; in Count 6 plaintiff charges defendants with negligently and wrongfully manufacturing and engaging in the trans-shipment, facilitation, sale, delivery or distribution, for human use or consumption, certain deleterious foreign substances, vaccines, serum or drugs capable of causing death or serious injury to the user or recipient without attaching to the same an adequate or proper label giving notice of its dangerous or deadly qualities, and failing to include adequate direction for its proper use, all of which caused injury and hurt to the plaintiff; Count 7 charges that as a direct result of the use of such drugs and serums, the plaintiff was caused to lose consciousness and fall to the concrete floor and as a result suffered the injuries described in Count 5; in Count 9 the defendants are charged with willfully, wantonly and wrongfully and contrary to law, assaulting, battering, choking and torturing plaintiff and severely injuring him in various parts of his body.

Plaintiff has filed his verified statement in opposition to

defendants' motion for summary judgment in which he asserts that: "the acts were perpetrated by defendants out of personal hatred and private malice completely unconnected with their lawful employment, duty, authority or responsibility as officers or employees of the United States; that defendants, though employed at the penitentiary were not acting within the scope and course of their employment or in performance of any official duty or in the exercise of any rightful or lawful authority as employees of the United States; that they acted beyond and outside the outer perimeter of their line of duty as employees at the time of the acts complained of; that the acts complained of were perpetrated by defendants in violation of their instructions, regulations and orders promulgated by the Attorney General of the United States; that the acts were perpetrated contrary and in violation of the laws of Kansas and the United States; that the acts complained of had no relevancy to the defendants' employment, duty use, all of which caused injury and hurt to the plaintiff; Count 7 charges that as a direct result of the use of such drugs and serums, the plaintiff was caused to lose consciousness and fall to the concrete floor and as a result suffered the injuries described in Count 5; in Count 9 the defendants are charged with willfully, wantonly and wrongfully and contrary to law, assaulting, battering, choking and torturing plaintiff and severely injuring him in various parts of his body.

Plaintiff has filed his verified statement in opposition to defendants' motion for summary judgment in which he asserts that: "the acts were perpetrated by defendants out of personal hatred and private malice completely unconnected with their lawful employment, duty, authority or responsibility as officers or employees of the United States; that defendants, though employed at the penitentiary were not acting within the scope and course of their employment or in performance of any official duty or in the exercise of any rightful or lawful authority as employees of the United States; that they acted beyond and outside the outer perimeter of their line of duty as employees at the time of the acts complained of; that the acts complained of were perpetrated by defendants in violation of their instructions, regulations and orders promulgated by the Attorney General of the United States; that the acts were perpetrated contrary and in violation of the laws of Kansas and the United States; that the acts complained of had no relevancy to the

defendants' employment, duty or authority as agents of the United States; that the acts complained of were committed while defendants were on a private frolic, excursion or venture of their own and in reckless disregard of life and limb of the plaintiff and that the acts were complained of while defendants were under the influence of alcohol or other intoxicants."

These statements made by plaintiff are conclusionary and do not change the situation about which there is no dispute; there is no question but what plaintiff was legally committed to the custody of the Warden (plaintiff swears that he was kept under lock and key). It was the duty of defendant Jarvis as Chief Medical Officer to give plaintiff such medical treatment as in his opinion plaintiff required. If in the performance of these duties and while exercising their responsibility, the acts charged by plaintiff were committed by defendants, legal aspects are not changed by the claim of plaintiff that defendants were not acting within the scope of their authority, or in course of their employment, or in exercise of any rightful authority as employees of the United States, or even that they acted contrary to the regulations and orders promulgated by the Attorney General or that the acts had no relevancy to their employment, duty or authority or that they were intoxicated. Conclusionary statements that would not be admissible in evidence at a trial (F.R.C.R.56(e)) do not support the contention made by plaintiff that the conduct of defendants was outside the scope of their authority or jurisdiction, though the acts may have been wrongful and could subject the defendants to severe criticism and condemnation. See *Walling* v. *Fairmont Creamery Company*, 139 F. 2d 318, 323.

Nor can plaintiff's right to recover be based on the rule announced in the case of *United States* v. *Muniz*, 374 U.S. 150, for there the action was brought by a prisoner in a federal penitentiary to recover damages against the United States under the Federal Torts Claim Act because of personal injuries sustained during his confinement in a federal prison and resulting from negligence of a government employee. Furthermore the provision of the Tort Claims Act would not be available to plaintiff in this case because as stated in *Muniz*, the government is not liable for the intentional torts of its employees. The plaintiff here asserts that the outrages perpetrated against him by defendants were committed purposely and maliciously by them. Cf. *Morton* v. *United States*, 228 F. 2d 431 (DC App.).

Plaintiff insists that the defendants, by filing a general denial to his action while the case was pending in the State District Court of Leavenworth County, Kansas, failed to raise the affirmative defense of immunity as required by Rule 8(c), and that they have by such failure waived their right to now advance such a defense under guise of a motion for summary judgment under Rule 56.

As to the amendments the Supreme Court has held in *Foman* v. *Davis*, 371 U.S. 178, that,

> "In the absence of any apparent or declared reason—such an undue delay, bad faith or dilatory notice on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be 'freely given'."

The Court believes that plaintiff mistakes the interpretation of the Federal Rules of Civil Procedure requiring the pleading of affirmative defenses in an initial pleading. As was said in Barron & Holtzoff (Wright Ed.) Vol. 1A § 442 p. 709,

> "Under this Rule (Rule 15) leave to amend pleadings should be granted freely when justice so requires, and the adverse party will not be prejudiced thereby, to clarify the issues and expedite the disposition of litigation. Indeed it is perhaps no exaggeration to say that the only reason for not allowing an amendment to a pleading is prejudice to the opposing party. . . . Prejudice may be found however, where the amendment will cause excessive delay, or where a course of evidence has become unavailable, or a statute of limitations would bar a new suit if opposing parties should lose the present action."

It does not appear that such prejudice exists in this case.

We are considering this case under defendants' motion for summary judgment, and such a motion may be filed at any time before trial and may be considered by the Court if its consideration can be determinative of the issues in the case. The Court is not limited when ruling on a motion for summary judgment to the pleadings on file but in addition to the pleadings, the Court may consider affidavits, admissions, stipulations, depositions which are submitted for or against the motion. *Hahn* v. *Bucyrus-Erie*, 8 F.R.D. 315. The Rule, 56(c), directs that the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admis-

sions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A defendant need not file answer to raise the issue of whether or not, in any event, the plaintiff is entitled to recover. If the Court determines under Rule 56(c) that plaintiff under the facts stated in his complaint, cannot recover on any theory that might be presented under the plaintiff's pleading, then the motion should be sustained.

Plaintiff points out to the Court that before the Court can sustain a motion for summary judgment offered by the defendants in this case, he must find *first*, that there is absolutely no genuine issue of material fact existing in this action; *second*, that defendants are absolutely entitled to judgment as a matter of law in this action; and *third*, both of the above conditions must co-exist in this action before the motion can be sustained. Plaintiff is correct in his statement of the law, but if the defense of immunity in this case must be sustained, then there remains no issue of fact to be determined.

In actions of this kind the Court is required to determine a conflict that arises by reason of the doctrine of executive or official immunity on the one hand, and the protection of the individual citizen against damage caused by the oppressive or malicious action of a public officer. The courts have consistently undertaken to shield responsible government officers from harrassment and inevitable hazards of vindictive or ill-founded damage suits based on acts done in the exercise of their official responsibilities. See *Barr* v. *Matteo*, 360 U.S. 364, 365; and *Gregorie* v. *Biddle*, 177 F. 2d 279, 581, 2 CA.

It has been held that as to judicial and executive officers, the test to determine the existence of immunity from suits for monetary recovery based on allegedly wrongful acts is whether or not the officers were acting within the scope of their authority or in the discharge of their duties. Initially, the broadest interpretation of scope of authority was applied to judicial officers so as to protect them from civil suits to recover for actions taken by them in the exercise of their official functions, irrespective of the motives with which these acts were alleged to have been performed. The doctrine first applied to heads of executive departments and excused them from liability provided the action had more or less connection with the general matters committed by law to their control or supervision. Later the doctrine of broad interpretation began to spread to

subordinate officials, directly leading to the moderan approach or official immunity described in *Gregorie* v. *Biddle*, supra, where it was said:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books." 177 F. 2d at 581.

The foregoing statement was approved in *Barr* v. *Matteo*, supra, and in that case the Supreme Court held that the doctrine of executive immunity would apply despite the allegations of malice in the complaint, provided that the action complained of was within the outer perimeter of the officer's line of duty. This is simply another way of stating that the act must have more or less connection with the general matters committed by law to the officer's control or supervision and not be manifestly or palpably beyond his authority. *Norton* v. *McShane*, 332 F. 2d 855, 859.

Again it was said in the *Barr-Matteo* case that the rank of the officer does not determine the applicability of the doctrine of immunity. In that case it was said, p. 573:

> "To be sure, the occasions, upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of *discretion*, it entails. It is not the title of his office by the *duties* with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' Spalding v. Vilas, supra, 161 U.S. at page 498. 16 S.Ct. at page 637—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits." 360 U.S. at 572–74, 79 S.Ct. at 1340, 1341. [Emphasis added.]

There is another factor which must be considered in determining the application of the immunity rule in cases of this kind. The Courts have held that to be immune the officer must have been performing a discretionary function and in the case of *Gustavsson Contracting Company* v. *Floete*, 299 F. 2d 655, 659, CA 2, the Court stated, page 659:

> "There is no litmus paper test to distinguish acts of discretion . . . , and to require a finding of 'discretion' would merely postpone, for one step in the process of reasoning the determination of the real question—is the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexations or fictitious suits and alleged personal liability?"

The doctrine of official immunity has been applied by Federal Courts in suits brought against numerous officials for many different kinds of torts, and by the great weight of authority, law enforcement officers are immune from civil suits based upon allegedly malicious acts. In the case of *Swanson* v. *Willis*, 114 F. Supp. 434, affirmed in 220 F. 2d 440, CA 9, where a defendant, a former deputy United States Marshal was sued for damages by reason of battery and false arrest of the plaintiff, committed while defendant was arresting or maintaining custody of the plaintiff, it was held that there were no facts alleged

from which it could be inferred that the defendant acted outside the scope of his authority, as that term is explained in *Cooper* v. *O'Connor*, 99 F. 2d 143, discussed in *Hartline* v. *Clary*, 141 F. Supp. 151, 157:

> "In determining whether these defendants acted within the scope of their authority, the Court may properly take official notice of official duties of each and thus determine whether the acts charged fell within the scope of their authority. Cooper v. O'Connor, 99 F. 2d 135, 139. This case held that, in determining this question: 'It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute (United States v. Birdsall, 233 U.S. 223, 230–231, 34 S. Ct. 512, 58 L. Ed. 930); or even that they should be specifically directed or requested by a superior officer. Mellon v. Brewer, 57 App. D.C. 126, 129, 18 F. 2d 168, 171, 53 A.L.R. 1519, certiorari denied, 275 U.S. 530, 48 S. Ct. 28, 72 L. Ed. 409. It is sufficient if they are done by an officer *in relation* to matters committed by law to his control or supervision. (Emphasis supplied.) (Spalding v. Vilas, 161 U.S. 483, 498, 16 S. Ct. 631, 637, 40 L. Ed. 70; and see Lang v. Wood, 67 App. D.C. 287, 288, 92 F. 2d 211, 212); or that they are governed by a lawful requirement of the department under whose authority the officer is acting.'"

Furthermore under the facts of this case, whether immunity is to be afforded these defendants is a matter to be determined under Federal law, *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652, while in common law actions against State officers, the doctrine immunity is governed by State law. *Nesmith* v. *Alford*, 318 F. 2d 110, CA 5. Cf. *Mayor* v. *Cooper*, 6 Wall. 247 and *Tennessee* v. *Davis*, 100 U.S. 267.

Though plaintiff contends his action is grounded on liability imposed on defendants under state law following *Farmer* v. *Rutherford*, 136 Kan. 298, it now convincingly appears from the record that the conduct of defendants was indeed within the outer perimeter of their line of duty. In support of the motion for summary judgment the defendant Willingham has filed his affidavit outlining his duties and responsibilities as Warden of the United States Penitentiary at Leavenworth, Kansas, further showing that plaintiff Morgan is an inmate of the institution, which fact is not denied, and that the only

contact Willingham has had with Morgan has been inside the walls of the United States Penitentiary and in performance of Willingham's official duties as Warden of that institution. Similarly the defendant Jarvis has filed his affidavit in support of the motion for summary judgment in which he states that he is the Chief Medical Officer at the United States Penitentiary at Leavenworth and he is responsible for the medical care and treatment of 2,059 inmates and 417 employees and has the overall administrative responsibility for the conduct of the prison hospital and the medical care and treatment of the inmates and employees, including the supervision of the medical staff and the responsibility for determining the need for and suitability of all types of drugs and medicines used at the institution, the purchasing of the same as well as the administration of them. He further states in his affidavit that the only contact he had with plaintiff Morgan has been in the prison hospital in the penitentiary and then only in the performance of his duties as Chief Medical Officer with regard to the medical care and treatment, diagnosis and routine physical examination of plaintiff.

To offset these sworn statements of defendants, plaintiff has filed a responsive affidavit, stating in substance that he is and has been a prisoner confined in the United States Penitentiary at Leavenworth; that the defendants have waived their defense of immunity in that they had filed an answer in the State Court in which this action was originally instituted, and in which answer no defense of immunity was set forth or alleged and that it was not until the motion for summary judgment was filed that the contention of immunity was brought into this suit; that witnesses by which plaintiff could refute the defendants' claim that their only contact with him was in their official capacity are no longer at the penitentiary and their whereabouts are unknown, and plaintiff cannot now obtain their statements for such refutation; that he has been kept under lock and key and prevented from contacting witnesses and has been prevented from using law books and legal materials that would be helpful to him in presenting his case, and that the conduct of the defendants in belatedly raising the claim of immunity has mislead him and that he has had no opportunity to fairly oppose it. He further states that defendants committed the tortious acts upon him alleged in his complaint while under the influence of alcohol or other intoxicants, without any provocation whatsoever.

The Court has reviewed the entire file in this case, has examined the affidavits and the authorities cited by the parties and many more. The Court is persuaded that none of the specific charges made and stated by plaintiff overcome the undisputed fact that all of the activities of the defendants Willingham and Jarvis and their conduct come within the ambit of their duties and responsibilities as Warden and Chief Medical Officer respectively of the Penitentiary, and the charge that they acted maliciously and without provocation or while under the influence of intoxicating liquor does not remove or restrict the broad rule of immunity. See *Hartline* v. *Clary*, (supra). Also see *Barr* v. *Matteo*, (supra) at page 576 where it was said:

> "To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good."

While it is not raised or contended by the plaintiff, the Court notes in passing that this action cannot be sustained under the authority of the Civil Rights Act, 42 U.S.C. § 1983, for the reason that to sustain an action under that provision of law, the person charged must be acting under color of State law whereas in the instant suit the defendants were acting under color of Federal law. *Paragianakis* v. *The Samos*, 186 F. 2d 257, CA 4.

For the reasons stated above the Court now determines that the complaint fails to state a claim upon which relief can be granted as to the defendants Willingham and Jarvis, therefore, the motion for summary judgment filed by these two defendants must be granted.

IT IS THEREFORE ORDERED that the motion of defendant John T. Willingham and C. A. Jarvis for summary judgment against the plaintiff, Daniel Morgan, be and the same is hereby granted, and the plaintiff's complaint and the cause of action sought to be stated therein against the defendants Willingham and Jarvis is dismissed.

IT IS SO ORDERED.

DATED at Topeka, Kansas this 14th day of December, 1966.

/S/ GEORGE TEMPLAR.
United States District Judge.

United States District Court for the District of Kansas
Civil Action File No. T-4113

DANIEL MORGAN

vs.

JOHN T. WILLINGHAM, C. A. JARVIS, THE FIRST DOE CORPORATION, THE SECOND DOE CORPORATION, THE ROE COMPANY, AND DOE NUMBERS 1 THROUGH 72

JUDGMENT

[Filed Dec. 14, 1966]

This action came on for (hearing) before the Court, Honorable George Templar, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the motion of defendant John T. Willingham and C. A. Jarvis for summary judgment against the plaintiff, Daniel Morgan, be and the same is hereby granted, and the plaintiff's complaint and the cause of action sought to be stated therein against the defendants Willingham and Jarvis is dismissed.

Dated at Topeka, Kansas, this 14th day of December, 1966.

CHARLES W. CAHILL,
Clerk of Court.
By SHARON L. PRATT,
Deputy.

ENTERED IN THE DOCKET December 14, 1966.

ATTEST: A true copy.

CHARLES W. CAHILL,
Clerk.
By SHARON L. PRATT,
Deputy.

[Caption Omitted]

ORDER

[Filed Dec. 23, 1966]

This action was filed by plaintiff in the State District Court of Leavenworth County, Kansas. Defendants Willingham and Jarvis removed the action to this Court under the provisions

of 28 U.S.C. § 1442(a)(1). Plaintiff filed a motion to remand and the Court directed that plaintiff be produced at the hearing of this motion held on October 14, 1960 at which hearing plaintiff offered evidence and argument and submitted brief. The Court thereafter on October 18, 1966 entered its order denying the motion to remand.

Defendants Willingham and Jarvis in the meantime had filed a motion for a summary judgment. Extensive briefs and affidavits, verified statements were filed by both plaintiff and the defendants Willingham and Jarvis.

The Court considered the briefs, the sworn statements of the parties and on December 14, 1966 filed a memorandum of Decision sustaining defendants' motion for summary judgment, following which the Clerk entered a formal order as required by the applicable rule.

Plaintiff files now a motion to correct the record alleging that the judgment recites that the judgment was entered after a "hearing" and after the issues had been "heard" by the Court. Plaintiff claims as reason for his objection and as he contends that there was in fact no "hearing" held and no issues "heard" by the Court.

Technically the plaintiff is correct, no "hearing" was required by Rule 56 and the Court proceeded to make its determination on the record before it as that Rule authorizes and permits. Plaintiff complains that he was not brought out on a writ so that he could appear in Court and present evidence on the motion. He also charges that his motion for "production of documents", his request for subpoenas and his motion to require defendants to answer interrogatories submitted by him were ignored and that this deprived him of an opportunity to fully present his case and make evidence available to support his claims.

The Court considered the "motion for production of documents" and has reviewed all of the fifty-nine interrogatories and the numerous sub-divisions contained in the interrogatories. They are saturated with racial overtones that would have no bearing on the issues of the case. The documents requested in plaintiff's motion and the answers sought by the interrogatories submitted by him to the defendant Willingham could not change the rule of immunity which this Court believes controls the case.

The Court sustains in part plaintiff's motion to correct the judgment entered by the Clerk and directs that the word "consideration" be substituted for the word "hearing", and the word "considered" be substituted for the word "heard". All other requests in the motion are denied.

The Court also denies plaintiff's motion for order compelling answer to interrogatories or in the alternative for judgment by default; denies plaintiff's motion for production of documents; denies plaintiff's petition for a writ of habeas corpus ad testificandum and denies his request as "attorney" for plaintiff for issuance of subpoenas.

IT IS SO ORDERED.

DATED at Topeka, Kansas this 23d day of December, 1966.

/s/ GEORGE TEMPLAR,
United States District Judge.

United States District Court for the District of Kansas

Civil Action File No. T-4113

DANIEL MORGAN

vs.

JOHN T. WILLINGHAM, C. A. JARVIS, THE FIRST DOE CORPORATION, THE SECOND DOE CORPORATION, THE ROE COMPANY, AND DOE NUMBERS 1 THROUGH 72

AMENDED JUDGMENT

[Filed Dec. 27, 1966]

This action came on for consideration before the Court, Honorable George Templar, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is Ordered and Adjudged that the motion of defendant John T. Willingham and C. A. Jarvis for summary judgment against the plaintiff, Daniel Morgan, be and the same is hereby granted, and the plaintiff's complaint and the cause of action

sought to be stated therein against the defendants Willingham and Jarvis is dismissed.

Dated at Topeka, Kansas, this 27th day of December, 1966.

CHARLES W. CAHILL,
Clerk of Court.
SHARON L. PRATT,
Deputy.

ENTERED IN THE DOCKET December 27, 1966.

ATTEST: A true copy.

CHARLES W. CAHILL,
Clerk.
By SHARON L. PRATT,
Deputy.

In the United States District Court for the District of Kansas

Civil Action No. T–4113

DANIEL MORGAN, PLAINTIFF AND APPELLANT

vs.

JOHN T. WILLINGHAM ET AL., DEFENDANTS AND APPELLEES

NOTICE OF APPEAL

[Filed Jan. 6, 1967]

Plaintiff Daniel Morgan hereby gives Notice that he appeals to the United States Court of Appeals for the 10th Circuit from all adverse rulings and from the final judgment and decision of the above-entitled Court in the above-entitled action, granting "Summary judgment" in favor of defendants, entered herein on December 14, 1966; and from the further and belated order of said Court, denying all of plaintiff's outstanding motions lately pending in said action, entered herein on December 23, 1966; and from the amended judgment entered herein on December 27, 1966.

DANIEL MORGAN,
Plaintiff and Appellant.

Dated: 1–3–67.

United States Court of Appeals Tenth Circuit

September Term 1967

[Filed Oct. 5, 1967]

DANIEL MORGAN, APPELLANT

vs.

JOHN T. WILLINGHAM, AND C. A. JARVIS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Submitted on the Briefs

Appellant pro se.

Newell A. George, United States Attorney and James R. Ward, Assistant United States Attorney, Topeka, Kansas, for appellees.

Before MURRAH, Chief Judge, WILBUR K. MILLER,* Senior Circuit Judge and HICKEY, Circuit Judge.

MURRAH, Chief Judge.

This is an appeal from an order granting a motion for summary judgment in favor of appellees Willingham and Jarvis and dismissing the complaint and cause of action brought against them by appellant, a prisoner at the United States Penitentiary, Leavenworth, Kansas.

Morgan filed this action for damages totaling more than $93,000,000 in the Leavenworth County District Court. The summons and complaint named Willingham and Jarvis, the Warden and Chief Medical Officer at the Penitentiary as the principal defendants.[1] The appellees, through their attorney, filed a general answer in the Leavenworth County District

* Of the United States Court of Appeals for the District of Columbia sitting by designation.

[1] Numerous unidentified individuals and corporations were also named as defendants. Since the complaint was never amended to properly identify them nor were they served with process, they did not become proper parties in the action below and we do not consider any claims against them in this opinion.

Court. The action was then removed to the United States District Court for the District of Kansas.[2]

The appellant then filed a verified motion to remand the cause to the state court. This motion was denied but the trial court stated that it would consider a renewed motion if the facts as subsequently developed, showed the defendants were not acting under color of office.

In substance, the complaint[3] charged that Willingham, Jarvis and others ordered unqualified penitentiary inmates to inoculate the appellant with a "deleterious foreign substance, serum, or drug" which resulted in permanent injury to him. The complaint further alleged that Willingham, Jarvis and others "out of malice * * * did willfully, wantonly or wrongfully, and contrary to the law, assault, batter, club, choke and torture the plaintiff severely injuring [him]."

The appellees then filed a motion for summary judgment and included affidavits of both Willingham and Jarvis. Appellant filed a verified opposition to the motion for summary judgment. In granting the motion, the trial court held that the plaintiff failed to "overcome the undisputed fact that all of the activities of the defendants Willingham and Jarvis and their conduct come within the ambit of their duties and responsibilities as Warden and Chief Medical Officer respectively of the penitentiary and the charge that they acted maliciously and without provocation or while under the influence of intoxicating liquor does not remove or restrict the broad rule of immunity."

This appeal presents two major issues which although related must be treated separately since the authority for the court's action comes from different sources. The primary issue is whether the court properly granted appellee's petition for removal or whether it erred in failing to remand the cause to the state court. The secondary issue is whether the trial court correctly found appellees immune from prosecution and granted summary judgment as to them. For the reasons which follow, we do not reach this secondary issue.

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[2] The record shows that all the requirements of 28 U.S.C. § 1446 were satisfied.

[3] Five of the original ten counts were dismissed on motion of the appellant. Two of the remaining five counts relate to actions of the unidentified corporate defendants and form no part of this appeal. We are therefore only concerned with Counts IV, V and IX of the original complaint.

This action was removed to the federal courts under the provision of 28 U.S.C. § 1442 (a)(1). This section provides for removal of an action commenced in a state court if the defendants are officers of the United States or agency thereof or persons acting under such office and the act complained of was either "under color of such office" or "on account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals." It cannot seriously be disputed that the appellees fall within the class of persons covered by the section. The more difficult question concerns whether the acts complained of were committed "under color of office."

It should first be emphasized that § 1442, like the common law doctrine of immunity, presents different standards for different classes of federal personages. An officer of the federal court may remove an action against him if the act was "under color of office or in the performance of his duties." § 1442(a)(3); and see Jones v. McGill, 46 F. 2d 334 (D. New Hampshire 1931); Simpson v. McVey, 217 F. Supp. 575 (S.D. Ohio 1963). A congressional officer may remove an action if the act was "in the discharge of his official duty under order of (either House of Congress)." § 1442(a)(4). In this respect, the removal statutes parallel the common law doctrine of immunity which applies broadly to judicial officers and narrowly to agents of the Executive Branch of the Federal Government.

There is abundant support for the proposition that the "color of office" test which applies to these appellees provide a rather limited basis for removal. State of Ohio v. Dorko, 247 F. Supp. 866 (N.D. Ohio 1965); Nass v. Mitchell, 233 F. Supp. 414 (D. Maryland 1964); Brenner v. Kelly, 201 F. Supp. 871 (D. Minn. 1962); Goldfarb v. Muller, 181 F. Supp. 41 (D.N.J. 1959). Those courts have rejected the contention that the words "under color of office" mean no more than "in the course and scope of employment." Circuit Judge Goodrich suggested that "to make scope and course of employment the test for 'color of office' is * * * to twist the statute out of its rational construction and go far beyond anything that Congress could possibly have intended in its enactment (of the removal statutes)." Ebersole v. Helm, 185 F. Supp. 277, 278 (E.D. Penn. 1960). This rationale accounts for the numerous decisions which hold that removal of a civil suit or criminal prosecution which resulted from the operation of a motor vehicle by one who was

clearly acting within the course and scope of his official government employment is improper and that the case must be remanded to the state court. State of Ohio v. Dorko, supra; Nass v. Mitchell, supra; Galbert v. Shivley, 186 F. Supp. 150 (W.D. Ark. 1960); Ebersole v. Helm, supra; Goldfarb v. Muller, supra; Fink v. Gerrish, 149 F. Supp. 915 (S.D.N.Y. 1957); State of Oklahoma v. Willingham, 143 F. Supp. 445 (E.D. Okla. 1956. *Contra* Pepper v. Sherrill, 181 F. Supp. 40 (E.D. Tenn. 1958); City of Norfolk v. McFarland, 143 F. Supp. 587 (E.D. Va. 1956)..

In Brenner v. Kelly, 201 F. Supp. 871 (D. Minn. 1962), a case which is somewhat analagous to the case at bar, the court held that doctors employed in the Veterans' Administration Hospital were not entitled to remove a malpractice action originally filed in the state court. The holding seems to be premised on the belief that while federal doctors act under the color of office, when operating properly they are not required nor are they authorized to negligently treat patients entrusted to their care and when they do so, they do not act under color of office. To be eligible for removal the defendant must exclude the possibility that the suit is based on acts or conduct not justified by his federal duty. Maryland v. Soper, 270 U.S. 9, 33.

In the case at bar, the trial court erroneously equated the standards which govern common law immunity with those which determine the statutory eligibility for removal of an action commenced in a state court. The only undisputed evidence was that the only contact the appellees had with the appellant occurred within the walls of the penitentiary.[4] While this may have adequately supported the finding of immunity, we find it insufficient to support the requisite determination that the alleged acts were performed under "color of office."

We are thus faced with an apparent divergence in the criteria for the removal of proceedings against federal officers in the state courts and the criteria for determining if the federal officer is immune from prosecution in suit for damages in the federal court. While this divergence is indeed regrettable, its cause is

[4] We agree that the conclusionary statements contained in the appellant's verified answer to the motion for summary judgments were inadmissible under Rule 56(e), Federal Rules of Civil Procedure. However, the statements in appellees' affidavits that their only contact with appellant was in performance of their duties was equally conclusionary and inadmissible. Stone v. Phillips, 245 F. Supp. 247 (D. Colo. 1965).

not unrecognizable. The doctrine of official immunity stems from a common law doctrine which has been expanded by the courts in recent decisions.[5] The test for removal is not based on the evolution of the common law doctrine of immunity, but is a creature of statute and the courts are bound by the language of the statute. The test for removal is not the same as the test for immunity for the former is much narrower than the latter. If these standards are to be equated it must be done through legislative action and not through judicial expansion of the removal statutes.

We conclude that the record fails to establish that the alleged acts were committed under "color of office." The cause must be remanded for a factual determination of this issue.[6] if the evidence does not establish that the alleged acts were committed under "color of office", the cause must be remanded to the state court.

REVERSED AND REMANDED.

MARCH TERM, MONDAY, MARCH 11TH, 1968

DANIEL MORGAN, APPELLANT

vs.

JOHN T. WILLINGHAM ET AL., APPELLEES

Appeal From the United States District Court for the District of Kansas

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Wilbur K. Miller and Honorable John J. Hickey, Circuit Judges.

This cause came on to be heard on the petition of appellees for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

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[5] Compare Norton v. McShane, 332 F. 2d 855 (5 CA 1964) cert. den. 380 U.S. 981, with Kelley v. Dunne, 344 F. 2d 129 (1 CA 1965).

[6] It may be that the answers to some of appellant's interrogations would provide a factual basis for the determination of the removal question. We note that these interrogations were not answered nor do we find that appellees were excused from answering them.

Supreme Court of the United States

October Term, 1967

No. ———

JOHN T. WILLINGHAM AND C. A. JARVIS, PETITIONERS

vs.

DANIEL MORGAN

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 24, 1968.

(S) BYRON R. WHITE,
Associate Justice of the Supeme Court of the United States.

Dated this 10th Day of June, 1968.

Supreme Court of the United States

October Term, 1968

No. 228

JAMES T. WILLINGHAM AND C. A. JARVIS, PETITIONERS

v.

DANIEL MORGAN

ORDER ALLOWING CERTIORARI

Filed December 9, 1968

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1969

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

JOHN T. WILLINGHAM AND C. A. JARVIS, PETITIONERS

v.

DANIEL MORGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of John T. Willingham and C. A. Jarvis, the Warden and Chief Medical Officer of the federal penitentiary at Leavenworth, Kansas, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on October 5, 1967.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 15–21) is reported at 383 F. 2d 139. The opinions of the district court (App. B and C, *infra*, pp. 23–28, 29–42) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1967. A timely petition for rehearing was denied on March 11, 1968. On June 10, 1968, Mr.

Justice White extended the time for filing a petition for certiorari to and including June 24, 1968. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the warden and chief medical officer of a federal penitentiary are entitled to remove an action brought in a state court by a federal prisoner, based upon torts allegedly committed within the prison walls, under 28 U.S.C. 1442(a)(1), which authorizes the removal to a federal court of civil actions brought against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office * * *."

2. Whether the court of appeals was correct in holding that the "color of office" test for removal of a suit by a federal official is "much narrower" than the standard of official immunity from suit as delineated in *Barr* v. *Matteo*, 360 U.S. 564.

STATUTE INVOLVED

28 U.S.C. 1442 provides, in pertinent part:

> *Federal Officers sued or prosecuted.*
> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or

punishment of criminals or the collection of the revenue. * * *

STATEMENT

A tort action was brought in a Kansas state court by Daniel Morgan, a prisoner at the United States Penitentiary in Leavenworth, Kansas,[1] against John T. Willingham, the prison warden, and C. A. Jarvis, its chief medical officer, and 75 unidentified co-defendants.[2] The complaint alleged, primarily, that defendants (petitioners here) had twice caused plaintiff (respondent here) to be inoculated with a "deleterious foreign substance, serum or drug," resulting in various injuries, and did "assault, batter, club, choke, and torture the plaintiff," causing him serious injury (App., pp. 16, 24–25, 30–31). Respondent sought a total of $2,200,000 in damages from petitioner Willingham, and a total of $1,065,000 in damages from petitioner Jarvis.

The case was removed to the United States District Court for the District of Kansas, upon a verified petition for removal, filed by Willingham and Jarvis, based upon 28 U.S.C. 1442(a)(1). The petition stated:

> That any act or thing that these petitioners, or either of them may have done or authorized to be done concerning the plaintiff as alleged

[1] Morgan is no longer incarcerated at the Leavenworth prison, having been mandatorily released on May 9, 1968.

[2] The complaint named as additional defendants "The First Doe Corporation, The Second Doe Corporation, The Roe Company and Doe numbers 1 through 72." No additional defendants were ever identified, however, and the complaint was simply dismissed as to the named defendants Willingham and Jarvis (App., p. 42).

> and complained of by plaintiff in his said complaint or petition, was done and made by them in the course of their duties as officers of the United States of America and as persons acting under officers of the United States of America and under color of such offices and by virtue thereof; namely, as warden of the United States Penitentiary at Leavenworth, Kansas and as an employee of the United States Public Health Service assigned to the United States Penitentiary at Leavenworth, Kansas, respectively; and that the acts complained of were made solely under color of their respective offices and within the scope of their authority.

Respondent moved to remand the action to the State court, asserting generally that petitioners "were not employed nor were they under any obligation or duty to the United States to commit any of the several torts alleged," and that the commission of such torts was "a frolic of their own which had no relevancy to their official duties" (see App., pp. 31–32).

Petitioners moved for summary judgment, on the ground that, as federal officers engaged in their duties, they were immune from respondent's suit. The district court denied respondent's motion to remand the case to the State court, and granted petitioners' motion for summary judgment. Relying on uncontradicted affidavits of Willingham and Jarvis, which described their official duties in detail and stated that their only contact with Morgan had been inside the walls of Leavenworth Penitentiary, in the perform-

ance of their official duties, the district court ruled that Willingham and Jarvis were immune from the suit under the doctrine of *Barr* v. *Matteo*, 360 U.S. 564 (App., pp. 29–42). Accordingly, it dismissed the complaint.

The court of appeals reversed, without reaching the issue whether the district court had been correct in concluding that petitioners were immune from the suit. Instead, that court held that the "color of office" test for removal by federal officials under 28 U.S.C. 1442(a)(1) is "much narrower" than the "official immunity" standard (App., p. 20). The court further stated that while the record "may have adequately supported the finding of immunity," it did not sufficiently establish that the alleged acts were committed under "color of office" (*ibid.*). It therefore remanded the case to the district court "for a factual determination of this issue" (App., pp. 20–21).

REASONS FOR GRANTING THE WRIT

The holding of the Tenth Circuit that the "color of office" test for removal of an action under 28 U.S.C. 1442(a)(1) is significantly narrower than the standard for determining a federal officer's immunity from suit, and that an extensive factual hearing is necessary before deciding whether federal prison officials are acting under color of office in allegedly committing torts against a prisoner, is erroneous. The decision below is based upon a misreading of the plain language of the removal statute, and seriously undermines the congressional purpose in enacting that provision. Moreover, the court's holding and its under-

lying rationale are in direct conflict with rulings of at least two circuits—the Second and the Fifth—at least impliedly approved by this Court, that such a suit may properly be removed upon "the allegation that petitioners were officers acting under color of office in the employment of the United States * * *" (*Allman* v. *Hanley,* 302 F. 2d 559, 562 (C.A. 5)). Finally, the ruling below tends to undercut the immunity of federal officials from suit for acts done in the line of duty since the factual hearings it would apparently require to resolve the removal issue might well be tantamount to the litigation from which the doctrine of *Barr* v. *Matteo,* 360 U.S. 564, seeks to protect such officials.

1. The ruling below that the "color of office" test for removal of the suit by a federal official has a "much narrower" reach than the standard for official immunity from suit—*i.e.,* whether the individual was acting "within the outer perimeter of [his] line of duty" (*Barr* v. *Matteo,* 360 U.S. at 575)—has no sound basis and defeats the purpose of the law in this area. Even an officer who goes beyond the outer perimeter of his assigned duties may nevertheless be acting under a claim or "color" of his office. Yet the court below, while noting that the undisputed evidence "may have adequately supported the finding of immunity," concluded that it was nonetheless "insufficient to support" a determination that the alleged acts were performed under color of office for removal purposes (App., p. 20). This turns the law topsy-turvy.

In analogous circumstances this Court has consistently read "color of law" provisions broadly (*e.g.,*

Screws v. *United States*, 325 U.S. 91; *Williams* v. *United States*, 341 U.S. 97; *Monroe* v. *Pape*, 365 U.S. 167). Moreover, the manifest purpose of the removal statute is to protect federal officers from vexatious litigation in a potentially unfavorable forum. That protection serves the national purpose of avoiding any undue interference by the state courts with activities essentially federal in character. Thus, the removal statute of necessity has a broader, not a more limited, scope than the official immunity standard.[3]

The holding below also impairs the purposes of the official immunity doctrine. The necessary result of the ruling that there is a more stringent "factual" test for removal than for official immunity will be to sub-

[3] Removal to federal courts of suits brought in State courts against certain classes of federal officers has been provided for ever since the enactment of the Federal Judiciary Act in 1789 (see *Tennessee* v. *Davis*, 100 U.S. 257, 267). Various opinions of this Court have traced the development of the removal concept and have discussed the reasons underlying the statutory provisions. *E.g.*, *Tennessee* v. *Davis*, 100 U.S. at 262–265; *Gay* v. *Ruff*, 292 U.S. 25, 32–34. While originally limited to revenue officers, the statute has been successively extended to the point where, in its present form, it covers all federal officers. See, *e.g.*, H. Rep. No. 308, 80th Cong., 1st Sess., p. A134 (1947). Throughout the removal statute's history, it has been recognized that the basic purpose underlying the provisions is to protect the interests of the national government by shielding its agents from litigation regarding their official duties in a potentially unfavorable or parochial forum; thus, it is essentially an incident of federal supremacy. For a general discussion of 28 U.S.C. 1442, see 1A Moore, *Federal Practice* ¶ 0.164, pp. 821–839 (1965). Interestingly, Moore specifically points out the Section 1442 creates "a jurisdictional right of removal quite apart from the general removal statute," and requires no separate basis of federal court jurisdiction (*id.* at 825, 837–838.)

ject federal officials to oppressive litigation from which the immunity doctrine purports to protect them. As was pointed out in *Barr* v. *Matteo* (360 U.S. at 571):

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.[4]

A requirement for extensive factual hearings on the removal issue would entail the expenditure of time and energies and inhibit governmental officials in carrying out their duties no less than if they were compelled to defend against groundless suits on the merits. Moreover, it can hardly be believed that Congress, in enacting 28 U.S.C. 1442(a)(1), intended that a federal court would be required not only to reach the merits of the immunity defense but to go further and apply a higher standard in deciding whether the suit was within its jurisdiction as having been properly removed.

2. The ruling below directly conflicts with decisions of the Second and Fifth Circuits. *E.g., Allman* v.

[4] See also *Howard* v. *Lyons*, 360 U.S. 593 (decided along with *Barr* v. *Matteo*); *Spalding* v. *Vilas*, 161 U.S. 483; *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949 (quoted from at length in *Barr* v. *Matteo*, 360 U.S. at 571–572); *Norton* v. *McShane*, 332 F. 2d 855 (C.A. 5), certiorari denied, 380 U.S. 981.

Hanley, 302 F. 2d 559, 561 (C.A. 5); *Poss* v. *Lieberman,* 299 F. 2d 358 (C.A. 2), certiorari denied, 370 U.S. 944; see also *Rachel* v. *Georgia,* 342 F. 2d 336, 340 (C.A. 5), affirmed, 384 U.S. 780, 793.[5] As stated in *Allman* v. *Hanley,* 302 F. 2d at 562, "the allegation that petitioners were officers acting under color of office in the employment of the United States was sufficient [for the statute] requires only a short, plain statement of facts entitling a defendant to removal." In the instant case, it is undisputed that petitioners' only contacts with respondent were within the walls of the Leavenworth prison. It seems absurd to suggest that the activities within a prison of that institution's warden and chief medical officer are not even under "color" of their offices. Indeed, the opinion primarily relied upon by the Tenth Circuit, *Maryland* v. *Soper,* 270 U.S. 9, 33, stated that

> * * * the statute does not require that the prosecution must be for the very acts which

[5] Decisions of several other circuits are also implicitly in conflict with the approach taken here by the court below. See *Sarner* v. *Mason,* 228 F. 2d 176, 178 (C.A. 3); *Meredith* v. *Van Oosterhout,* 286 F. 2d 216, 219 (C.A. 8), certiorari denied, 365 U.S. 835; cf. *O'Campo* v. *Hardisty,* 262 F. 2d 621, 624 (C.A. 9); *Murphy* v. *Kodz,* 351 F. 2d 163, 165 (C.A. 9); *Preble* v. *Johnson,* 275 F. 2d 275 (C.A. 10). Other decisions in the Second and Fifth Circuits are in accord with the holdings in the *Allman* and *Poss* cases on this issue. *Ove Gustavsson Contracting Co.* v. *Floete,* 299 F. 2d 655, 660 (C.A. 2), certiorari denied, 374 U.S. 827; *Blitz* v. *Boog,* 328 F. 2d 596, 600 (C.A. 2); *DeBusk* v. *Harvin,* 212 F. 2d 143, 146 (C.A. 5); *State of Texas* v. *National Bank of Commerce of San Antonio,* 290 F. 2d 229, 231 (C.A. 5), certiorari denied *sub nom. Falkner, Banking Commissioner* v. *National Bank of Commerce of San Antonio, Texas,* 368 U.S. 832.

> the officer admits to have been done by him under federal authority. It is enough that his acts *or his presence at the place in performance of his official duty* constitute the basis, though mistaken or false, of the state prosecution. [Emphasis added.]

Here it seems evident that the Tenth Circuit has lost sight of the purposes of the removal statute.[6] In this regard, the Second Circuit pointed out in *Poss* v. *Lieberman,* 299 F. 2d at 359, that:

> Where a federal officer asserts a privilege for acts done under color of his office the defense is based upon a federal right, the purpose of which is to prevent federal employees from being unduly harassed by "vindictive or ill founded damage suits brought on account of action taken in the exercise of their official responsibilities" * * *. Consequently, the federal government has a special interest in such matters which justifies the granting of removal jurisdiction to the federal courts in such cases. * * *

Nor can the decision below properly be justified on the ground that 28 U.S.C. 1442(a)(1) should be "narrowly" construed to avert improper infringements upon legitimate interests of the states (App., p. 18) Removal from a state court of a suit by a federal prisoner against federal prison officials based upon torts allegedly committed within the walls of a federal prison scarcely endangers the delicate balance between

[6] The removal statute should be construed, of course, to give full effect to the purposes for which it was enacted. See *Venable* v. *Richards*, 105 U.S. 636, 638; *Colorado* v. *Symes*, 286 U.S. 510, 517; see also note 3, *supra*.

state, and national governments which exists in our federal system.[7] Indeed, the removal provisions seem peculiarly applicable to suits brought against federal prison officials in state courts. Otherwise, a state court would be faced with the necessity of construing and applying statutes and regulations of the federal government relating to the management of federal penal institutions, although the alleged acts took place within the exclusive jurisdiction of the United States and are of little if any concern to the particular state. See *Horne* v. *Aderhold,* 1 F. Supp. 690 (N.D. Ga.); *Jones* v. *McGill,* 46 F. 2d 334 (D. N.H.). That is precisely the kind of thing Congress intended should not happen in enacting and expanding the removal statute.

3. We recognize that the decision below is interlocutory in the sense that it remands the cause to the district court for further hearings on whether the activities of petitioners were "under color of office" (App. pp. 20–21). Of course, since this case comes

[7] The Tenth Circuit also relied upon several district court decisions for the proposition that suits based on allegedly "negligent" or "wrongful" performance of activities of a federal official, otherwise under color of office, are not removable because of such allegations (App., pp. 18–19). Those decisions are erroneous, and contrary to more persuasive opinions. See, *e.g., Logemann* v. *Stock,* 81 F. Supp. 337, 339 (D. Neb.); see also *Perez* v. *Rhiddlehoover,* 247 F. Supp. 65, 71 (E.D. La.), where the court stated: "The determinative feature for removal is the status of the defendant as a federal official. Any contention that the character of the alleged violation is controlling ignores the plain language and well-known purpose of the removal statute."

Significantly, neither the *Allman* nor the *Poss* case (see *supra,* pp. 8–9) was referred to in the opinion of the court below.

from a federal, not a state court, the lack of a final judgment does not preclude this Court's exercise of its certiorari jurisdiction (compare 28 U.S.C. 1254(1) with 28 U.S.C. 1257(3)). And while the Court has considered the interlocutory nature of a case coming from a federal court as an important factor to be considered in determining whether to grant certiorari (see, *e.g., Land* v. *Dollar,* 330 U.S. 731), it has repeatedly indicated that this factor is not dispositive and that certiorari will nevertheless be granted where there is a clear-cut legal issue which is important to the further conduct of the case (*e.g., Aetna Casualty & Surety Co.* v. *Flowers,* 330 U.S. 464; see generally Stern & Gressman, *Supreme Court Practice* §§ 2–2, 4–19 (3d ed.), and cases there discussed). For several reasons, the instant case appears to fit plainly within the category of established exceptions to the finality rule.

In the first place, the court of appeals' ruling, if not reviewed now, may improperly subject petitioners, and numerous other federal officials similarly situated in future cases, to vexatious proceedings from which they are presumably immunized as a matter of law. Such proceedings would at least include the factual hearings on the "color of office" issue for which the court below here remanded to the district court. Moreover, the decision below, if not reversed, is likely to result in a number of erroneous remands of such cases to state courts for determination of the official immunity question and, at least in some cases, for a full-blown state court trial if the immunity defense is rejected. Since district court orders remand-

ing cases to state courts are not reviewable (see 28 U.S.C. 1447(d)),[8] the harmful effects of the decision may go unchecked for a substantial period of time before the issue could again be presented to this Court. Finally, the error of the decision below is manifest, and the conflict among the circuits is plain. Hence, we submit, review at this point is fully warranted.

CONCLUSION

For the foregoing reasons, certiorari should be granted, the judgment of the court below should be reversed, and the case should be remanded for a determination whether petitioners were properly held immune from respondent's suit.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
EDWIN L. WEISL, JR.,
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MORTON HOLLANDER,
WALTER H. FLEISCHER,
Attorneys.

JUNE 1968.

[8] There is no doubt, however, that this Court may review an order of a court of appeals requiring a federal district court to remand a case to a State court. See *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464.

APPENDIX A

United States Court of Appeals
Tenth Circuit

September Term 1967

No. 9281

DANIEL MORGAN, APPELLANT

vs.

JOHN T. WILLINGHAM AND C. A. JARVIS, APPELLEES

Appeal from the United States District Court for the District of Kansas

SUBMITTED ON THE BRIEFS

Appellant pro se.

Newell A. George, United States Attorney and *James R. Ward,* Assistant United States Attorney, Topeka, Kansas, for appellees.

Before MURRAH, Chief Judge, WILBUR K. MILLER,* Senior Circuit Judge and HICKEY, Circuit Judge.

MURRAH, *Chief Judge.*

This is an appeal from an order granting a motion for summary judgment in favor of appellees Willingham and Jarvis and dismissing the complaint and cause of action brought against them by appellant, a prisoner at the United States Penitentiary, Leavenworth, Kansas.

* Of the United States Court of Appeals for the District of Columbia sitting by designation.

310-118—68——3

Morgan filed this action for damages totaling more than $93,000,000 in the Leavenworth County District Court. The summons and complaint named Willingham and Jarvis, the Warden and Chief Medical Officer at the Penitentiary as the principal defendants.[1] The appellees, through their attorney, filed a general answer in the Leavenworth County District Court. The action was then removed to the United States District Court for the District of Kansas.[2]

The appellant then filed a verified motion to remand the cause to the state court. This motion was denied but the trial court stated that it would consider a renewed motion if the facts, as subsequently developed, showed the defendants were not acting under color of office.

In substance, the complaint[3] charged that Willingham, Jarvis and others ordered unqualified penitentiary inmates to inoculate the appellant with a "deleterious foreign substance, serum, or drug" which resulted in permanent injury to him. The complaint further alleged that Willingham, Jarvis and others "out of malice * * * did willfully, wantonly or wrongfully, and contrary to the law, assault, batter, club, choke and torture the plaintiff severely injuring [him]."

[1] Numerous unidentified individuals and corporations were also named as defendants. Since the complaint was never amended to properly identify them nor were they served with process, they did not become proper parties in the action below and we do not consider any claims against them in this opinion.

[2] The record shows that all the requirements of 28 U.S.C. § 1446 were satisfied.

[3] Five of the original ten counts were dismissed on motion of the appellant. Two of the remaining five counts relate to actions of the unidentified corporate defendants and form no part of this appeal. We are therefore only concerned with Counts IV, V and IX of the original complaint.

The appellees then filed a motion for summary judgment and included affidavits of both Willingham and Jarvis. Appellant filed a verified opposition to the motion for summary judgment. In granting the motion, the trial court held that the plaintiff failed to "overcome the undisputed fact that all of the activities of the defendants Willingham and Jarvis and their conduct come within the ambit of their duties and responsibilities as Warden and Chief Medical Officer respectively of the penitentiary and the charge that they acted maliciously and without provocation or while under the influence of intoxicating liquor does not remove or restrict the broad rule of immunity."

This appeal presents two major issues which although related must be treated separately since the authority for the court's action comes from different sources. The primary issue is whether the court properly granted appellee's petition for removal or whether it erred in failing to remand the cause to the state court. The secondary issue is whether the trial court correctly found appellees immune from prosecution and granted summary judgment as to them. For the reasons which follow, we do not reach this secondary issue.

This action was removed to the federal courts under the provision of 28 U.S.C. § 1442(a)(1). This section provides for removal of an action commenced in a state court if the defendants are officers of the United States or agency thereof or persons acting under such office and the act complained of was either "under color or such office" or "on account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals." It cannot seriously be disputed that the appellees fall within the class of persons covered by the section. The more

difficult question concerns whether the acts complained of were committed "under color of office."

It should first be emphasized that § 1442, like the common law doctrine of immunity, presents different standards for different classes of federal personages. An officer of the federal court may remove an action against him if the act was "under color of office or in the performance of his duties." § 1442(a)(3); and see *Jones* v. *McGill*, 46 F. 2d 334 (D. New Hampshire 1931); *Simpson* v. *McVey*, 217 F. Supp. 575 (S.D. Ohio 1963). A congressional officer may remove an action if the act was "in the discharge of his official duty under order of (either House of Congress)." § 1442(a)(4). In this respect, the removal statutes parallel the common law doctrine of immunity which applies broadly to judicial officers and narrowly to agents of the Executive Branch of the Federal Government.

There is abundant support for the proposition that the "color of office" test which applies to these appellees provides a rather limited basis for removal. *State of Ohio* v. *Dorko*, 247 F. Supp. 866 (N.D. Ohio 1965); *Nass* v. *Mitchell*, 233 F. Supp. 414 (D. Maryland 1964); *Brenner* v. *Kelly*, 201 F. Supp. 871 (D. Minn. 1962); *Goldfarb* v. *Muller*, 181 F. Supp. 41 (D. N.J. 1959). Those courts have rejected the contention that the words "under color of office" mean no more than "in the course and scope of employment." Circuit Judge Goodrich suggested that "to make scope and course of employment the test for 'color of office' is * * * to twist the statute out of its rational construction and go far beyond anything that Congress could possibly have intended in its enactment (of the removal statutes)." *Ebersole* v. *Helm*, 185 F. Supp. 277, 278 (E.D. Penn. 1960). This rationale accounts

for the numerous decisions which hold that removal of a civil suit or criminal prosecution which resulted from the operation of a motor vehicle by one who was clearly acting within the course and scope of his official government employment is improper and that the case must be remanded to the state court. *State of Ohio* v. *Dorko, supra; Nass* v. *Mitchell, supra; Galbert* v. *Shivley,* 186 F. Supp. 150 (W.D. Ark. 1960); *Ebersole* v. *Helm, supra; Goldfarb* v. *Muller, supra; Fink* v. *Gerrish,* 149 F. Supp. 915 (S.D.N.Y. 1957); *State of Oklahoma* v. *Willingham,* 143 F. Supp. 445 (E.D. Okla. 1956). *Contra Pepper* v. *Sherrill,* 181 F. Supp. 40 (E.D. Tenn. 1958); *City of Norfolk* v. *McFarland,* 143 F. Supp. 587 (E.D. Va. 1956).

In *Brenner* v. *Kelly,* 201 F. Supp. 871 (D. Minn. 1962), a case which is somewhat analagous to the case at bar, the court held that doctors employed in the Veterans' Administration Hospital were not entitled to remove a malpractice action originally filed in the state court. The holding seems to be premised on the belief that while federal doctors act under the color of office, when operating properly they are not required nor are they authorized to negligently treat patients entrusted to their care and when they do so, they do not act under color of office. To be eligible for removal the defendant must exclude the possibility that the suit is based on acts or conduct not justified by his federal duty. *Maryland* v. *Soper,* 270 U.S. 9, 33.

In the case at bar, the trial court erroneously equated the standards which govern common law immunity with those which determine the statutory eligibility for removal of an action commenced in a state court. The only undisputed evidence was that the only contact the appellees had with the appellant

occurred within the walls of the penitentiary.[4] While this may have adequately supported the finding of immunity, we find it insufficient to support the requisite determination that the alleged acts were performed under "color of office."

We are thus faced with an apparent divergence in the criteria for the removal of proceedings against federal officers in the state courts and the criteria for determining if the federal officer is immune from prosecution in suit for damages in the federal court. While this divergence is indeed regrettable, its cause is not unrecognizable. The doctrine of official immunity stems from a common law doctrine which has been expanded by the courts in recent decisions.[5] The test for removal is not based on the evolution of the common law doctrine of immunity, but is a creature of statute and the courts are bound by the language of the statute. The test for removal is not the same as the test for immunity for the former is much narrower than the latter. If these standards are to be equated it must be done through legislative action and not through judicial expansion of the removal statutes.

We conclude that the record fails to establish that the alleged acts were committed under "color of office." The cause must be remanded for a factual

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[4] We agree that the conclusionary statements contained in the appellant's verified answer to the motion for summary judgments were inadmissible under Rule 56(e), Federal Rules of Civil Procedure. However, the statements in appellees' affidavits that their only contact with appellant was in performance of their duties was equally conclusionary and inadmissible. *Stone* v. *Phillips*, 245 F. Supp. 247 (D. Colo. 1965).

[5] Compare *Norton* v. *McShane*, 332 F. 2d 855 (5 CA 1964) cert. den. 380 U.S. 981, with *Kelley* v. *Dunne*, 344 F. 2d 129 (1 CA 1965).

determination of this issue.[6] If the evidence does not establish that the alleged acts were committed under "color of office", the cause must be remanded to the state court.

Reversed and remanded.

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[6] It may be that the answers to some of appellant's interrogations would provide a factual basis for the determination of the removal question. We note that these interrogations were not answered nor do we find that appellees were excused from answering them.

APPENDIX B

In the United States District Court for the District of Kansas

CIVIL No. T–4113

DANIEL MORGAN, PLAINTIFF

vs.

JOHN T. WILLINGHAM, ET AL., DEFENDANTS

RULING ON PLAINTIFF'S MOTION TO REMAND

On July 27, 1966 plaintiff brought an action against defendants John T. Willingham and C. A. Jarvis jointly and severally charging them along with seventy-five co-defendants with torts committed "in their capacity as individuals or private persons"; the verified complaint filed in the State District Court for Leavenworth County, Kansas contained ten separate counts.

On August 15, 1966 an answer was filed by the United States Attorney for the District of Kansas in the Leavenworth County State Court which purported to be an answer of defendants John T. Willingham and C. A. Jarvis denying in general terms the charges and accusations of the complaint. This answer consisted of what might be termed a general denial.

On August 25, 1966 the defendants Willingham and Jarvis filed in this Court their petition for removal of action to the United States District Court from the State District Court of Leavenworth County, Kansas. An appropriate bond for removal was approved and

filed and the matter was removed to this Court in the manner prescribed by law.

Thereafter and on September 2, 1966 plaintiff herein filed a motion to remand the action to the State Court from which it had been removed.

Upon hearing before this Court the plaintiff requested leave to dismiss Counts 1, 2, 3, 8 and 10 of his original verified complaint. The Court sustained this motion and there remains for consideration before the Court the claims and charges asserted in Counts 4, 5, 6, 7 and 9. Count 4 of the complaint charges in substance that defendant ordered and utilized penitentiary inmates and other persons not qualified to administer dangerous drugs to him and to practice medicine in the State of Kansas and to innoculate him with deleterious foreign substances, serum or drugs resulting in his permanent injury; in Count 5 plaintiff charges that as a result of the injection of serum or drug into his body by defendants he was caused to lose consciousness, fall to the concrete floor and injure his head and various parts of his body; in Count 6 plaintiff charges defendants with negligently and wrongfully manufacturing and engaging in the transshipment, facilitation, sale, delivery or distribution, for human use or consumption, certain deleterious foreign substances, vaccines, serums or drugs capable of causing death or serious injury to the user or recipient without attaching to the same an adequate or proper label giving notice of its dangerous or deadly qualities, and failing to ineluding adequate directions for its proper use, all of which caused injury and hurt to the plaintiff; Count 7 charges that as a direct result of the use of such drugs and serums, the plaintiff was caused to lose consciousness and fall to a concrete floor and as a result suffered the injuries described in Count 5; in Count 9 the defend-

ants are charged with wilfully, wantonly and wrongfully and contrary to law, assaulting, battering, choking and torturing the plaintiff, and severely injuring him in various parts of his body.

In their petition for removal the defendants assert that the defendant Willingham is and was at all times pertinent the Warden of the United States Penitentiary at Leavenworth, Kansas in which place plaintiff was confined by a lawful judicial judgment; that the defendant C. A. Jarvis is and was at all times pertinent an employee of the United States Public Health Service assigned to the United States Penitentiary at Leavenworth, Kansas, and as such was an officer of the United States and a person acting under officers of the United States; that any act or thing that the defendants or either of them may have done or authorized to be done concerning the plaintiff as is alleged in his complaint, was done and made by them in the course of their duties as officers of the United States and as persons acting under officers of the United States and under color of such officers and by virtue thereof; that pursuant to the provisions of Title 28 United States Code § 1442(a)(1) petitioners are entitled to have the cause removed to the United States District Court for the District of Kansas. The defendants further assert in their petition for removal that they do not know the identity of any of the persons referred to as First Doe Corporation, Second Doe Corporation, and Roe Company and Doe numbers 1 through 72, as co-defendants with them.

The Court has reviewed authorities cited by the plaintiff in support of his contentions that this is an action brought against the defendants personally and not against them as officers of the United States, and that they are personally liable to him for their tortuous acts committed as individuals with malice and

purposely. That defendants would be personally liable to plaintiff in the State of Kansas under such circumstances can scarcely be questioned. See *Farmer* v. *Rutherford,* 136 Kan. 298, 15 P. 2d 474.

Though this is the law of Kansas, the defendants here seek to remove the action brought against them under the provisions of Section 1442, Title 28 U.S.C. Section (a)(1) provides that:

> "Any officer of the United States or any agency thereof or person acting under him for any act under color of such office or on account of any right, title or authority claimed under any Acts of Congress for the apprehension or punishment of criminals or the collection of the revenue."

An examination of the authorities reveal that under the Removal Statute, 28 U.S.C. § 1441, before a case can be removed it is necessary for the facts upon which the removal is based to appear on the face of the complaint or subsequent amendments thereto, filed by the plaintiff. *Romick* v. *Beckins,* 197 F. 2d 369. This is because the action may be removed under Section 1441 only where it is one over which the federal courts would have original jurisdiction in the first instance. But this rule does not apply where a defense is asserted based upon a federal right of removal granted under the provisions of 28 U.S.C. § 1442(a)(1) under which the removal of this case was sought and obtained. The removal in this case is based on federal interest in the matter, the facts underlying which may be stated in the removal petition itself, and from it determined whether or not federal jurisdiction existed over the claim as stated in the complaint as originally filed and served.

Where a federal officer asserts a privilege for acts done under color of his office, the defense is based upon a federal right, the purpose of which is to

prevent federal employees from being unduly harassed by vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities. *Barr* v. *Matteo,* 360 U.S. 564. The federal government has a special interest in such matters which justifies the granting of removal jurisdictions to the federal court in such cases. Congress has not in Section 1442, as in Section 1441, required that the case be one over which the Court have original jurisdiction in order for the defendant to obtain removal. In the revision of Title 28 United States Code, Act of June 25, 1948, c. 686, 62 Stat. 938, the right of removal was extended to apply to all officers and employees of the United States or any agency thereof. See Revisor's note 28 U.S.C.A. § 1442. As the case now stands before the Court, the motion to remand must be denied. Necessarily if, upon hearing of the case, it should develop that the acts of the defendants though allegedly done by them while acting under color of their office, were not so committed, then the Court, upon a renewal of plaintiff's motion to remand, would further consider it.

The Court is aware, as plaintiff urges, that the government is not liable for the intentional torts of its employees, 28 U.S.C. § 2680(h), but where the issue is raised by proper and sufficient allegations in the petition for removal as here, that whatever acts were done by the defendants or either of them, were acts required of them in performance of their responsibilities and duties as public officers and performed under color of such office, then the action becomes removable and the issue presented to this Court for determination. The case of *United States* v. *Muniz,* 374 U.S. 150, an examination of this decision reveals that it was an action maintained by a federal prisoner under the Federal Tort Claims Act to recover damages he suffered for personal injuries sustained by

him during confinement in a federal prison and resulting from negligence of a government employee. The Court simply held that such an action is maintainable. This is no authority for the contentions advanced by plaintiff here.

The right of removal of this cause, as sustained under the pleadings by *Jones* v. *McGill,* 46 F. 2d 334, and *Poss* v. *Lieberman,* 299 F. 2d 358.

In cases removed under Section 1442 of the statute, it is not necessary that all of the parties defendant join in the petition for removal. A single federal officer may obtain removal and this ends the power of the State Court to issue process because the entire case comes to the jurisdiction of the Federal Court. See *Allman* v. *Hanley,* 302 F. 2d 559.

It follows that plaintiff's motion to remand this cause to the State Court must be and is hereby overruled and denied.

There remains for the Court's consideration in this matter the motion of the defendants Willingham and Jarvis for summary judgment. Plaintiff was granted fifteen days from October 13, 1966 to file answer to the Government's brief, after which the Court will rule upon such motion.

DATED at Topeka, Kansas this 18th day of October, 1966.

/s/ GEORGE TEMPLAR
United States District Judge

APPENDIX C

In the United States District Court for the District of Kansas

No. T–4113

DANIEL MORGAN, PLAINTIFF

vs.

JOHN T. WILLINGHAM, C. A. JARVIS, ET AL.,

DEFENDANTS

MEMORANDUM OF DECISION

Sustaining Motion of Defendants Willingham and Jarvis for Summary Judgment

The files and records of this case disclose that on July 27, 1966 plaintiff brought an action against defendants John T. Willingham and C. A. Jarvis jointly and severally charging them, together with 75 co-defendants for tort committed "in their capacity as individuals or private persons". The verified complaint filed in the state district court for Leavenworth County, Kansas contains ten separate counts.

On August 15, 1966 a pleading was filed by the United States Attorney for the District of Kansas in the Leavenworth County State Court which purported to be an answer for the defendants John T. Willingham and C. A. Jarvis, which answer denied in general terms the charges and accusations contained in the complaint. The answer consisted of what might properly be termed a general denial.

On August 25, 1966 defendants Willingham and Jarvis filed in this Court their petition for removal

of the action from the State Court to this Court. This Court considered the motion of plaintiff to remand the case to the District Court of Leavenworth County, Kansas and on October 18, 1966 that motion was denied and this Court retained jurisdiction of the case.

In the meantime defendants John T. Willingham as Warden of the United States Penitentiary at Leavenworth, Kansas, and C. A. Jarvis as Chief Medical Officer of that institution filed their joint motion for summary judgment in favor of defendants and against plaintiff on the grounds that all of the allegations contained in the plaintiff's pleadings and evidence in the record of the above entitled case discloses that defendants were and are immune from suit of the kind and nature alleged in plaintiff's complaint against them.

The suit as instituted by plaintiff originally contained ten counts. Plaintiff requested leave to dismiss Count 1, 2, 3, 8 and 10, which leave was granted by the Court and those Counts were dismissed. There remains for the Court's consideration the claims and charges asserted by plaintiff in Counts 4, 5, 6, 7 and 9 of the complaint. Count 4 of the complaint charges in substance that defendants ordered and utilized penitentiary inmates and other persons not qualified, to administer dangerous drugs to him and to practice medicine in the State of Kansas, and to inoculate him with deleterious foreign substances, serum or drugs resulting in his permanent injury; in Count 5 plaintiff charges that as a result of the injection of serum or drug into his body by defendants that he was caused to lose consciousness, fall to the concrete floor and injure his head and various parts of his body; in Count 6 plaintiff charges defendants with negligently and wrongfully manufacturing and engaging in the transhipment facilitation, sale, delivery or distribution,

for human use or consumption, certain deleterious foreign substances, vaccines, serum or drugs capable of causing death or serious injury to the user or recipient without attaching to the same an adequate or proper label giving notice of its dangerous or deadly qualities, and failing to include adequate direction for its proper use, all of which caused injury and hurt to the plaintiff; Count 7 charges that as a direct result of the use of such drugs and serums, the plaintiff was caused to lose consciousness and fall to the concrete floor and as a result suffered the injuries described in Count 5; in Count 9 the defendants are charged with willfully, wantonly and wrongfully and contrary to law, assaulting, battering, choking and torturing plaintiff and severely injuring him in various parts of his body.

Plaintiff has filed his verified statement in opposition to defendants' motion for summary judgment in which he asserts that: "the acts were perpetrated by defendants out of personal hatred and private malice completely unconnected with their lawful employment, duty, authority or responsibility as officers or employees of the United States; that defendants, though employed at the penitentiary were not acting within the scope and course of their employment or in performance of any official duty or in the exercise of any rightful or lawful authority as employees of the United States; that they acted beyond and outside the outer perimeter of their line of duty as employees at the time of the acts complained of; that the acts complained of were perpetrated by defendants in violation of their instructions, regulations and orders promulgated by the Attorney General of the United States; that the acts were perpetrated contrary and in violation of the laws of Kansas and the United States; that the acts complained of had no relevancy

to the defendants' employment, duty or authority as agents of the United States; that the acts complained of were committed while defendants were on a private frolic, excursion or venture of their own and in reckless disregard of life and limb of the plaintiff and that the acts were complained of while defendants were under the influence of alcohol or other intoxicants."

These statements made by plaintiffs are conclusionary and do not change the situation about which there is no dispute; there is no question but what plaintiff was legally committed to the custody of the Warden (plaintiff swears that he was kept under lock and key). It was the duty of defendant Jarvis as Chief Medical Officer to give plaintiff such medical treatment as in his opinion plaintiff required. If in the performance of these duties and while exercising their responsiblity, the acts charged by plantiff were committed by defendants, legal aspects are not changed by the claim of plaintiff that defendants were not acting within the scope of their authority, or in course of their employment, or in exercise of any rightful authority as employees of the United States, or even that they acted contrary to the regulations and orders promulgated by the Attorney General or that the acts had no relevancy to their employment, duty or authority or that they were intoxicated. Conclusionary statements that would not be admissible in evidence at a trial (F.R.C.R.56(e)) do not support the contention made by plaintiff that the conduct of defendants was outside the scope of their authority or jurisdiction, though the acts may have been wrongful and could subject the defendants to severe criticism and condemnation. See *Walling* v. *Fairmont Creamery Company,* 139 F. 2d 318, 323.

Nor can plaintiff's right to recover be based on the

rule announced in the case of *United States* v. *Muniz*, 374 U.S. 150, for there the action was brought by a prisoner in a federal penitentiary to recover damages against the United States under the Federal Torts Claim Act because of personal injuries sustained during his confinement in a federal prison and resulting from negligence of a government employee. Furthermore the provision of the Tort Claims Act would not be available to plaintiff in this case because as stated in *Muniz*, the government is not liable for the intentional torts of its employees. The plaintiff here asserts that the outrages perpetrated against him by defendants were committed purposely and maliciously by them. Cf. *Morton* v. *United States*, 228 F. 2d 431 (DC App.)

Plaintiff insists that the defendants, by filing a general denial to his action while the case was pending in the State District Court of Leavenworth County, Kansas, failed to raise the affirmative defense of immunity as required by Rule 8(c), and that they have by such failure waived their right to now advance such a defense under guise of a motion for summary judgment under Rule 56.

As to amendments the Supreme Court has held in *Foman* v. *Davis*, 371 U.S. 178, that,

> "In the absence of any apparent or declared reason—such an undue delay, bad faith or dilatory notice on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be 'freely given'."

The Court believes that plaintiff mistakes the interpretation of the Federal Rules of Civil Procedure requiring the pleading of affirmative defenses in an

initial pleading. As was said in Barron & Holtzoff (Wright Ed.) Vol. 1A § 442 p. 709,

> "Under this (Rule 15) leave to amend pleadings should be granted freely when justice so requires, and the adverse party will not be prejudiced thereby, to clarify the issues and expedite the disposition of litigation. Indeed it is perhaps no exaggeration to say that the only reason for not allowing an amendment to a pleading is prejudice to the opposing party. * * * Prejudice may be found however, where the amendment will cause excessive delay, or where a source of evidence has become unavailable, or a statute of limitations would bar a new suit if opposing parties should lose the present action."

It does not appear that such prejudice exists in this case.

We are considering this case under defendants' motion for summary judgment, and such a motion may be filed at any time before trial and may be considered by the Court if its consideration can be determinative of the issues in the case. The Court is not limited when ruling on a motion for summary judgment to the pleadings on file but in addition to the pleadings, the Court may consider affidavits, admissions, stipulations, depositions which are submitted for or against the motion. *Hahn* v. *Bucyrus-Erie*, 8 F.R.D. 315. The Rule, 56(c), directs that the judgment sought shall be rendered forthwith if the pleadings, depositions, answer to interrogations, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A defendant need not file answer to raise the issue of whether or not, in any event, the plaintiff is entitled to recover. If the Court determines under Rule 56(c) that plaintiff under the

facts stated in his complaint, cannot recover on any theory that might be presented under the plaintiff's pleading, then the motion should be sustained.

Plaintiff points out to the Court that before the Court can sustain a motion for summary judgment offered by the defendants in this case, he must find *first,* that there is absolutely no genuine issue of material fact existing in this action; *second,* that defendants are absolutely entitled to judgment as a matter of law in this action; and *third,* both of the above conditions must co-exist in this action before the motion can be sustained. Plaintiff is correct in his statement of the law, but if the defense of immunity in this case must be sustained, then there remains no issue of fact to be determined.

In actions of this kind the Court is required to determine a conflict that arises by reason of the doctrine of executive or official immunity on the one hand, and the protection of the individual citizen against damage caused by the oppressive or malicious action of a public officer. The courts have consistently undertaken to shield responsible government officers from harassment and inevitable hazards of vindictive or ill-founded damage suits based on acts done in the exercise of their official responsibilities. See *Barr* v. *Matteo,* 360 U.S. 364, 365; and *Gregoire* v. *Biddle,* 177 F. 2d 279, 581, 2 CA.

It has been held that as to judicial and executive officers, the test to determine the existence of immunity from suits for monetary recovery based on allegedly wrongful acts is whether or not the officers were acting within the scope of their authority or in the discharge of their duties. Initially, the broadest interpretation of scope of authority was applied to judicial officers so as to protect them from civil suits to recover for actions taken by them in the exercise of

their official functions, irrespective of the motives with which those acts were alleged to have been performed. The doctrine first applied to heads of executive departments and excused them from liability provided the action had more or less connection with the general matters committed by law to their control or supervision. Later the doctrine of broad interpretation began to spread to subordinate officials, directly leading to the modern approach or official immunity described in *Gregoire* v. *Biddle, supra,* where it was said:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truent to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has

been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books." 177 F. 2d at 581.

The foregoing statement was approved in *Barr* v. *Matteo, supra,* and in that case the Supreme Court held that the doctrine of executive immunity would apply despite the allegations of malice in the complaint, provided that the action complained of was within the outer perimeter of the officer's line of duty. This is simply another way of stating that the act must have more or less connection with the general matters committed by law to the officer's control or supervision and not be manifestly or palpably beyond his authority. *Norton* v. *McShane,* 332 F. 2d 855, 859.

Again it was said in the *Barr-Matteo* case that the rank of the officer does not determine the applicability of the doctrine of immunity. In that case it was said, p. 573:

> "To be sure, the occasions, upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of *discretion,* it entails. It is not the title of his office but the *duties* with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' Spalding v. Vilas, supra, 161 U.S. at page 498. 16 S.Ct. at page 637—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits." 360 U.S. at

572—74, 79 S.Ct. at 1340, 1341. [Emphasis added.]

There is another factor which must be considered in determining the application of the immunity rule in cases of this kind. The Courts have held that to be immune the officer must have been performing a discretionary function and in the case of *Gustavsson Contracting Company* v. *Floete,* 299 F. 2d 655, 659, CA 2, the Court stated, page 659:

> "There is no litmus paper test to distinguish acts of discretion * * *, and to require a finding of 'discretion' would merely postpone, for one step in the process of reasoning the determination of the real question—is the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexations or fictitious suits and alleged personal liability?"

The doctrine of official immunity has been applied by Federal Courts in suits brought against numerous officials for many different kinds of torts, and by the great weight of authority, law enforcement officers are immune from civil suits based upon allegedly malicious acts. In the case of *Swanson* v. *Willis,* 114 F. Supp. 434, affirmed in 220 F. 2d 440, CA 9, where a defendant, a former deputy United States Marshal, was sued for damages by reason of battery and false arrest of the plaintiff, committed while defendant was arresting or maintaining custody of the plaintiff, it was held that there were no facts alleged from which it could be inferred that the defendant acted outside the scope of his authority, as that term is explained in *Cooper* v. *O'Connor,* 99 F. 2d 143, discussed in *Hartline* v. *Clary,* 141 F. Supp. 151, 157:

> "In determining whether these defendants acted within the scope of their authority, the

Court may properly take official notice of official duties of each and thus determine whether the acts charged fell within the scope of their authority. *Cooper* v. *O'Connor,* 99 F. 2d 135, 139. This case held that, in determining this question:

"'It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute (*United States* v. *Birdsall,* 233 U.S. 223, 230—231, 34 S.Ct. 512, 58 L.Ed. 930); or even that they should be specifically directed or requested by a superior officer. *Mellon* v. *Brewer,* 57 App. D.C. 126, 129, 18 F. 2d 168, 171, 53 A.L.R. 1519, certiorari denied, 275 U.S. 530, 48 S.Ct. 28, 72 L.Ed. 409. It is sufficient if they are done by an officer *in relation* to matters committed by law to his control or supervision. [Emphasis supplied.] (*Spalding* v. *Vilas,* 161 U.S. 483, 498, 16 S.Ct. 631, 637, 40 L.Ed. 70; and see *Lang* v. *Wood,* 67 App. D.C. 287, 288, 92 F. 2d 211, 212); or that they are governed by a lawful requirement of the department under whose authority the officer is acting.'"

Furthermore under the facts of this case, whether immunity is to be afforded these defendants is a matter to be determined under Federal Law, *Wheeldin* v. *Wheeler,* 373 U.S. 647, 652, while in common law actions against State officers, the immunity doctrine is governed by State law. *Nesmith* v. *Alford,* 318 F. 2d 110, CA 5. Cf. *Mayor* v. *Cooper,* 6 Wall 247 and *Tennessee* v. *Davis,* 100 U.S. 257.

Though plaintiff contends his action is grounded on liability imposed on defendants under state law following *Firmer* v. *Rutherford,* 136 Kan. 298, it now convincingly appears from the record that the conduct of defendants was indeed within the outer perimeter of their line of duty. In support of the motion for summary judgment the defendant Willingham has

filed his affidavit outlining his duties and responsibilities as Warden of the United States Penitentiary at Leavenworth, Kansas, further showing that plaintiff Morgan is an inmate of the institution, which fact is not denied, and that the only contact Willingham has had with Morgan has been inside the walls of the United States Penitentiary and in performance of Willingham's official duties as Warden of that institution. Similarly the defendant Jarvis has filed his affidavit in support of the motion for summary judgment in which he states that he is the Chief Medical Officer at the United States Penitentiary at Leavenworth and he is responsible for the medical care and treatment of 2059 inmates and 417 employees and has the overall administrative responsibility for the conduct of the prison hospital and the medical care and treatment of the inmates and employees, including the supervision of the medical staff and the responsibility for determining the need for and suitability of all types of drugs and medicines used at the institution, the purchasing of the same as well as the administration of them. He further states in his affidavit that the only contact he had with plaintiff Morgan has been in the prison hospital in the penitentiary and then only in the performance of his duties as Chief Medical Officer with regard to the medical care and treatment, diagnosis and routine physical examination of plaintiff.

To offset these sworn statements of defendants, plaintiff has filed a responsive affidavit, stating in substance that he is and has been a prisoner confined in the United States Penitentiary at Leavenworth; that the defendants have waived their defense of immunity in that they had filed an answer in the State Court in which this action was originally instituted, and in which answer no defense of immunity was set forth or

alleged and that it was not until the motion for summary judgment was filed that the contention of immunity was brought into this suit; that witnesses by which plaintiff could refute the defendants' claim that their only contact with him was in their official capacity are no longer at the penitentiary and their whereabouts are unknown, and plaintiff cannot now obtain their statements for such refutation; that he has been kept under lock and key and prevented from contacting witnesses and has been prevented from using law books and legal materials that would be helpful to him in presenting his case, and that the conduct of the defendants in belatedly raising the claim of immunity has misled him and that he has had no opportunity to fairly oppose it. He further states that defendants committed the tortious acts upon him alleged in his complaint while under the influence of alcohol or other intoxicants, without any provocation whatsoever.

The Court has reviewed the entire file in this case, has examined the affidavits and the authorities cited by the parties and many more. The Court is persuaded that none of the specific charges made and stated by plaintiff overcome the undisputed fact that all of the activities of the defendants Willingham and Jarvis and their conduct come within the ambit of their duties and responsibilities as Warden and Chief Medical Officer respectively of the Penitentiary, and the charge that they acted maliciously and without provocation or while under the influence of intoxicating liquor does not remove or restrict the broad rule of immunity. See *Hartline* v. *Clary* (*supra*). Also see *Barr* v. *Matteo* (*supra*) at page 576 where it was said:

> "To be sure, as with any rule of law which attempts to reconcile fundamentally antagonis-

tic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good."

While it is not raised or contended by the plaintiff, the Court notes in passing that this action cannot be sustained under the authority of the Civil Rights Act, 42 U.S.C. § 1983, for the reason that to sustain an action under that provision of law, the person charged must be acting under color of State law whereas in the instant suit the defendants were acting under color of Federal law. *Papagianakis* v. *The Samos*, 186 F. 2d 257, C.A. 4.

For the reasons stated above the Court now determines that the complaint fails to state a claim upon which relief can be granted as to the defendants Willingham and Jarvis, therefore the motion for summary judgment filed by these two defendants must be granted.

It is therefore ordered that the motion of defendant John T. Willingham and C. A. Jarvis for summary judgment against the plaintiff, Daniel Morgan, be and the same is hereby granted, and the plaintiff's complaint and the cause of action sought to be stated therein against the defendants Willingham and Jarvis is dismissed.

It is so ordered.

DATED at Topeka, Kansas this 14th day of December, 1966.

/s/ GEORGE TEMPLAR
United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 228

JOHN T. WILLINGHAM AND C. A. JARVIS, PETITIONERS

v.

DANIEL MORGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (A. 66–70) is reported at 383 F. 2d 139. The opinions of the district court (A. 40–44, 51–61) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1967. A timely petition for rehearing was denied on March 11, 1968. On June 10, 1968, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including June 24, 1968 (A. 71). The petition was filed on that date, and was granted on December 9, 1968 (A. 72). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under 28 U.S.C. 1442(a)(1), which authorizes the removal to a federal court of civil actions brought against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office * * *," the warden and chief medical officer of a federal penitentiary are entitled to remove an action brought in a State court by a federal prisoner based upon torts allegedly committed within the prison walls.

2. Whether the court of appeals erred in holding that the "color of office" test under the removal statute is "much narrower" than the standard of "official immunity" of government officials from suit as delineated in *Barr* v. *Matteo*, 360 U.S. 564.

STATUTE INVOLVED

28 U.S.C. 1442 provides, in pertinent part:

> Federal officers sued or prosecuted.
>
> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
>
> * * * * *
>
> (3) Any officer of the courts of the United

States, for any Act under color of office or in the performance of his duties * * *.

STATEMENT

Daniel Morgan, a prisoner in the United States Penitentiary at Leavenworth, Kansas,[1] brought a tort action in a Kansas State court against John T. Willingham, the prison warden, and C. A. Jarvis, its chief medical officer, and 75 unidentified co-defendants.[2] The complaint alleged, primarily, that defendants (petitioners here) had twice caused plaintiff (respondent here) to be inoculated with a "deleterious foreign substance, serum or drug," resulting in various injuries, and also did "assault, batter, club, choke, and torture the plaintiff," causing him serious injury (A. 12, 14). Respondent sought $2,200,000 damages from petitioner Willingham, and $1,065,000 damages from petitioner Jarvis (A. 15).

The case was removed to the United States District Court for the District of Kansas, upon petitioners' verified petition for removal under 28 U.S.C. 1442(a)(1). The petition stated that, at all times relevant to the complaint, Willingham was the warden of the United States Penitentiary at Leavenworth

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[1] Morgan is no longer incarcerated; he was released on May 9, 1968, and presently resides in Washington, D.C..

[2] The complaint named as additional defendants "The First Doe Corporation, The Second Doe Corporation, the Roe Company and Doe numbers 1 through 72." (A. 11). No additional defendants were ever identified, however, and the complaint was simply dismissed as to the named defendants Willingham and Jarvis by the district court (A. 61). Respondent sought a total of more than $93 million in damages from all defendants (A. 66).

(A. 6), Jarvis was an employee of the United States Public Health Service assigned to that penitentiary (*ibid.*), and Morgan was a duly committed prisoner or inmate at the penitentiary (A. 9). The petition also stated (*ibid*):

> That any act or thing that these petitioners, or either of them may have done or authorized to be done concerning the plaintiff as alleged and complained of by plaintiff in his said complaint or petition, was done and made by them in the course of their duties as officers of the United States of America and as persons acting under officers of the United States of America and under color of such offices and by virtue thereof; namely, as warden of the United States Penitentiary at Leavenworth, Kansas and as an employee of the United States Public Health Service assigned to the United States Penitentiary at Leavenworth, Kansas, respectively; and that the acts complained of were made solely under color of their respective offices and within the scope of their authority.

Respondent moved to remand the action to the State court, asserting that petitioners "were not employed nor were they under any obligation or duty to the United States to commit any of the several torts alleged," and that the commission of such torts was "a frolic of their own which had no relevancy to their official duties" (A. 31).[3]

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[3] In opposing the petition for a writ of certiorari, respondent pointed out that certain interrogatories he had filed in the Kansas State court prior to removal were not answered by petitioner Willingham, and contended that this justified the court of appeals' requiring additional factual hearings on the

Petitioners moved for summary judgment, on the ground that, as federal officers engaged in their official duties when the alleged tortious acts were committed, they were immune from respondent's suit. Willingham's affidavit set forth in detail his official duties as warden, and stated that his only contact with respondent had been inside the walls of the Leavenworth Penitentiary in performance of those duties (A. 44–46). Jarvis's affidavit (A. 47–48) similarly described his duties as chief medical officer at the penitentiary, and stated that the only contact he had with respondent "has been at the prison hospital" in performance of his duties as chief medical officer, "and only with regard to medical care and treatment, diagnoses and routine physical examination" (A. 48).

The district court denied respondent's motion to remand (A. 44), concluding that the case had properly been removed under 28 U.S.C. 1442(a)(1) (A. 42–43). Subsequently, the district court granted petitioners' motion for summary judgment and dis-

issue of removability. However, the only mention made by respondent in his motion to remand concerning those interrogatories related not to whether petitioners had acted under color of office, but asserted that "these removing defendants have dealt with and know the identity or true names of each and all of the persons referred to as their co-defendants * * *," and that "the plaintiff has sought by interrogatories, duly propounded to the defendant Willingham, to learn the true identity of the several Doe defendants herein so that he may amend the Complaint 'to include therein such persons' true name or identity whenever the same is discovered.' (See Complaint, page 2.) To date, the defendant Willingham has not seen fit to answer any of the said interrogatories" (A. 32).

missed the complaint (A. 61). Relying upon the uncontradicted affidavits of Willingham and Jarvis, the court ruled that they were immune from the suit under the doctrine of *Barr* v. *Matteo,* 360 U.S. 564 (A. 56–60).

On appeal, the issue whether the case was properly removed was not briefed before the court of appeals (until the filing of a petition for rehearing, after the decision below was rendered). Rather, respondent took the position that the assertions in petitioners' petition for removal to the federal district court (A. 6–10) did not constitute a sufficient basis for immunity from suit and that summary judgment on that ground had accordingly been improperly granted (A. 48–50). Thus, the case was submitted to the court of appeals on briefs dealing with various issues relating to the correctness of the district court's granting of summary judgment under the doctrine of *Barr* v. *Matteo.*[4]

The court of appeals reversed, however, without reaching the immunity issue and thus without expressly deciding whether the district court had correctly held that petitioners were immune from suit. Instead, that court ruled that the "color of office" test for removal of State court suits by federal officers

[4] In support of his contention that summary judgment on the immunity issue was improper, respondent urged, *inter alia*, that there were genuine issues of material fact relating to the immunity defense, that his interrogatories should have been answered before summary judgment was granted, and that petitioners allegedly had "waived" the immunity defense by their answer filed in the Kansas State court prior to removal (A. 48–50).

under 28 U.S.C. 1442(a)(1) is "much narrower" than the "official immunity" standard of *Barr* v. *Matteo* (A. 70). The court further stated that while the record "may have adequately supported the finding of immunity," it did not sufficiently establish that the alleged acts were committed under "color of office" (A. 69). It therefore remanded the case to the district court "for a factual determination of this issue" (A. 70). A petition for rehearing was denied without opinion (*ibid*).

SUMMARY OF ARGUMENT

The court of appeals held that the "color of office" test for removal is significantly narrower than the standard for determining a federal officer's immunity from suit, and that a factual hearing is necessary before deciding whether federal prison officials are acting under color of office in allegedly committing torts against a prisoner. The correct rule, however, should be precisely the contrary; even an officer who goes beyond the "outer perimeter of [his] line of duty" (*Barr* v. *Matteo,* 360 U.S. at 575) may nevertheless be acting under a claim or color of his office (cf. *United States* v. *Classic,* 313 U.S. 299, 326; *Screws* v. *United States,* 325 U.S. 91; *Williams* v. *United States,* 341 U.S. 97). Accordingly, the decision below, which conflicts with decisions of at least three, and arguably several more, courts of appeals, stands the law on its head, and is inconsistent with the plain language of 28 U.S.C. 1442(a)(1).

In addition to nullifying the express "color of office" language of the removal statute, the decision

below clashes with the purposes of *both* the removal statute and the "official immunity" doctrine.

Provisions for the removal of certain actions from State to federal courts date back to the Federal Judiciary Act of 1789 (see *Tennessee* v. *Davis*, 100 U.S. 257, 267), and specifically as to suits against federal officers, to 1815 (*ibid.*). The removal statute here involved is designed to ensure that a federal officer "shall not be forced to answer for conduct assertedly within his duties in any but a Federal forum" (*North Carolina* v. *Carr*, 386 F. 2d 129, 131 (C.A. 4); see *Poss* v. *Lieberman*, 299 F. 2d 358, 359 (C.A. 2), certiorari denied, 370 U.S. 944). Congress has successively expanded its scope to the point where, in its present form, it covers both criminal and civil actions against all federal officers. As discussed at length in various opinions of this Court, the underlying congressional purpose has been to protect against the litigation of suits against federal officers in a potentially parochial and unfavorable forum, not only for the sake of the individuals involved but as a reflection of the national government's interest in the proper resolution of such suits.

The principal rationale of the "official immunity" doctrine, as explained in *Barr* v. *Matteo*, is as follows (360 U.S. at 571):

> * * * [O]fficials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would other-

> wise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

To require extensive factual hearings on the threshold issue of removal would entail the unnecessary expenditure of time and energies and would necessarily inhibit governmental officials in carrying out their duties no less than if they were compelled to defend against groundless suits on the merits. Yet that is the consequence of the decision below.

ARGUMENT

THE "COLOR OF OFFICE" TEST FOR REMOVAL OF STATE COURT SUITS BY FEDERAL OFFICERS UNDER 28 U.S.C. 1442(a)(1) IS BROADER, NOT NARROWER, THAN THE STANDARD FOR THEIR IMMUNITY FROM SUIT UNDER BARR V. MATTEO, 360 U.S. 564; ALLEGED TORTS COMMITTED BY FEDERAL PRISON OFFICIALS AGAINST A FEDERAL PRISONER WITHIN THE WALLS OF A UNITED STATES PENITENTIARY ARE ACTIONS TAKEN UNDER COLOR OF THEIR OFFICES

I. THE HOLDING BELOW IS CONTRARY TO THE PLAIN LANGUAGE OF THE REMOVAL STATUTE

The particular provision of the federal removal statutes involved in the instant case, 28 U.S.C. 1442(a)(1), broadly authorizes the removal to federal district courts of any civil action or criminal prosecution brought in a State court against officers of the United States, or persons acting under them, "for any

act under color of such office."[5] Petitioners are both senior prison officials. The tortious acts they allegedly committed concededly took place within the prison where respondent was incarcerated. Giving the words of Section 1442(a)(1) their normal meaning, such acts were committed under "color of office."

Any action by a federal official within the "outer perimeter" of the line of duties of his office that is immune from suit under *Barr* v. *Matteo* would necessarily seem at least under "color" of the same office. Indeed, even actions beyond the outer perimeter of an official's duties might nonetheless be taken under a claim or "color" of his office. Cf. *United States* v. *Classic*, 313 U.S. 299, 326, where it is pointed out that even, "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken 'under color of' state law." Accord, *Screws* v. *United States*, 325 U.S. 91; *Williams* v. *United States*,

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[5] The petition for removal relied only upon 28 U.S.C. 1442(a)(1); however, in the court of appeals, the petition for rehearing on behalf of Willingham and Jarvis (the only occasion below where petitioners dealt with the removal question, see *supra*, p. 6) also defended the district court's refusal to remand on the basis of 28 U.S.C. 1442(a)(3), since petitioners, as penal officers, are officers of the courts. See *Brann* v. *McBurnett*, 29 F. Supp. 188 (E.D. Ark.); *Jones* v. *McGill*, 46 F. 2d 334 (D. N.H.); *Horne* v. *Aderhold*, 1 F. Supp. 690 (N.D. Ga.). The broad sweep of Section 1442(a)(3) was expressly recognized by the court of appeals. In citing that provision, the court below noted that "[a]n officer of the federal court may remove an action against him if the act was 'under color of office or in the performance of his duties'" (A. 68). Yet the court did not consider its possible application here

341 U.S. 97; *Monroe* v. *Pape*, 365 U.S. 167.[6] By parity of reasoning, any actions allegedly taken by federal prison officials respecting a federal prisoner within the walls of a United States prison wholly on federal property are "made possible only because the [alleged] wrongdoer is clothed with the authority of [federal] law" (*United States* v. *Classic*, 313 U.S. at 326).

Contrary to the holding below (A. 67), removability is not defeated by allegations of the wrongful or negligent character of the alleged actions. See *Blitz* v. *Boog*, 328 F. 2d 596 (C.A. 2), certiorari denied, 379 U.S. 855; *Perez* v. *Rhiddlehoover*, 247 F. Supp. 65, 71

[6] In *Screws* v. *United States*, 325 U.S. 91, 111–112, this Court noted that the "color of office" test for removal may be somewhat narrower than the "color of law" standard under congressional civil rights legislation, so as to ensure that removal does not "deprive state courts of their authority to enforce their own laws." Even though the removal statute here involved may be somewhat narrower in this regard, that is hardly enough to sustain the holding below. In the first place, there is no danger of deprivation of any conceivable State interest in the removal of a case involving alleged torts by federal prison officials against a federal prisoner within the walls of a federal prison located on United States property (see *Hayes* v. *United States*, 367 F. 2d 216, 218–220 (C.A. 10)). In any event, the "strict construction" argument does not justify the Tenth Circuit's view that the test for removability is narrower than the standard for immunity. If a federal official is immune from suit under *Barr* v. *Matteo*, any interest the State might have had which could be raised as an objection to removal plainly is overridden by the federal government's interest, which the immunity doctrine reflects, and the State could not properly proceed against him in *any* court. *North Carolina* v. *Carr*, 386 F. 2d 129 (C.A. 4). Moreover, there is no proper State interest in having the *Barr* v. *Matteo* issue—which is solely a matter of federal law (*Howard* v. *Lyons*, 360 U.S. 593, 597)—litigated in a State court.

(E.D. La.); cf. *Maryland* v. *Soper*, 270 U.S. 9, 33.[7] If it did, no such case would be removable, since an essential claim in such suits always is that the federal officers have acted improperly (see note 12, *infra*). Rather, as pointed out in *Allman* v. *Hanley*, 302 F. 2d 559, 562 (C.A. 5), such a suit may be removed upon "the allegation that petitioners were officers acting under color of office in the employment of the United States * * *." This standard reflects the plain language of Section 1442(a)(1); nothing therein even arguably suggests the conduct of the detailed factual inquiry which the decision below would require as a predicate for removal (see A. 69–70).

II. THE HOLDING BELOW IS INCONSISTENT WITH THE CONGRESSIONAL INTENT IN ENACTING AND SUCCESSIVELY EXPANDING THE SCOPE OF THE REMOVAL STATUTE

The purpose of 28 U.S.C. 1442(a)(1), as long recognized by this Court (see *infra*, pp. 13–17), was recently restated by the Court of Appeals for the Fourth Circuit in *North Carolina* v. *Carr*, 386 F. 2d 129, 131, as

[7] The court of appeals relied upon a district court case, *Brenner* v. *Kelly*, 201 F. Supp. 871 (D. Minn.), for the proposition that actions based upon allegations of "negligent" or "wrongful" acts of federal officers are not removable (A. 69). In our view, that case, and the other district court cases cited by the court of appeals, were wrongly decided and reached a result contrary to all previous and subsequent appellate court decisions. *E.g.*, *Blitz* v. *Boog*, *supra*; *Poss* v. *Lieberman*, 299 F. 2d 358 (C.A. 2), certiorari denied, 370 U.S. 944; *North Carolina* v. *Carr*, 386 F. 2d 129 (C.A. 4); *DeBusk* v. *Harvin*, 212 F. 2d 143 (C.A. 5); *Preble* v. *Johnson*, 275 F. 2d 275 (C.A. 10); *Allman* v. *Hanley*, 302 F. 2d 559 (C.A. 5). In any event, those decisions are plainly distinguishable from the situation here presented (see *infra*, p. 22).

> * * * to take from the State courts the indefeasible power to hold an officer or agent of the United States criminally or civilly liable for an act allegedly performed in the execution of any of the powers or responsibilities of the Federal sovereign. Neither immunity nor impunity is guaranteed the alleged offender; the statute merely transfers his trial to the Federal courts. Insistence upon the right of removal has been declared essential to the integrity and preeminence of the Federal government within its realm of authority. The reasons for the statute are so apparent, and were so carefully expounded, with its history carefully treated, in State of Tennessee v. Davis, 100 U.S. 257, 262 * * * (1879), that we have no occasion to reiterate here the necessity for its rigid enforcement.

In a similar vein, the Second Circuit pointed out *Poss* v. *Lieberman*, 299 F. 2d 358, 359, certiorari denied, 370 U.S. 944:

> Where a federal officer asserts a privilege for acts done under color of his office the defense is based upon a federal right, the purpose of which is to prevent federal employees from being unduly harassed by "vindictive or ill founded damage suits brought on account of action taken in the exercise of their official responsibilities" * * *. Consequently, the federal government has a special interest in such matters which justifies the granting of removal jurisdiction to the federal courts in such cases. * * *

See also *Allman* v. *Hanley*, 302 F. 2d 559, 562 (C.A. 5); *DeBusk* v. *Harvin*, 212 F. 2d 143, 146 (C.A. 5).

Removal to federal courts of suits brought in State

courts has been an aspect of our jurisprudence since the inception of the federal system. The Federal Judiciary Act of 1789 itself provided for removal of civil actions to federal courts in certain situations (Act of Sept. 24, 1789, ch. 20, sec. 12, 1 Stat. 79). See *Tennessee* v. *Davis,* 100 U.S. 257, 267. Provisions for the removal of State court actions brought against certain categories of federal officers are similarly of considerable antiquity. As recently noted by this Court in *Greenwood* v. *Peacock,* 384 U.S. 808, 821, n. 17, "Long before 1866, federal statutes had guaranteed certain federal revenue officers the right to remove to the federal court state court proceedings instituted against them because of their official actions." Earlier opinions of this Court have traced the development of the removal concept and have discussed the reasons underlying these statutory provisions. *E.g., Tennessee* v. *Davis,* 100 U.S. at 262–269; *Gay* v. *Ruff,* 292 U.S. 25, 32–34.

As noted in *Peacock, supra,* the Customs Act of 1815 was "the primordial officer removal statute" (384 U.S. at 821, n. 17). That statute (Act of Feb. 4, 1815, ch. 31, sec. 8, 3 Stat. 198) provided for the removal to a federal court of both civil and criminal suits against federal officers engaged in enforcing the customs laws, or acting "under colour thereof" (*ibid.*).[8] Subsequently, in the so-called Force Act of 1833, the scope of removal was broadened to include suits against federal officers and other persons "for

[8] See also Act of March 3, 1815, ch. 94, sec. 6, 3 Stat. 233, which contained virtually identical provisions regarding removal. The *Peacock* case, it should be noted, involved a companion provision to Section 1442—28 U.S.C. 1443—which provides for removal of certain civil rights litigation and dates back to 1866.

or on account of any act done under the revenue laws of the United States, or under colour thereof" (Act of March 2, 1833, ch. 57, sec. 3, 4 Stat. 633). As pointed out in *Davis, supra* (100 U.S. at 268–269), the provisions of that statute were carried forward in similar legislation enacted in 1866, which in turn was reenacted as Section 643 of the Revised Statutes, the provision involved in that case. Though subsequently reenacted, little actual change occurred in the statute until 1948. "Prior to 1948 the federal officer removal statute * * * was limited to revenue officers engaged in the enforcement of the criminal or revenue laws * * *," but "was expanded in 1948 to encompass all federal officers" (*Peacock, supra,* 384 U.S. at 820, n. 17). Thus, the removal statute here involved has been successively extended in scope to the point where, in its present form, it covers all federal officers acting under a claim or color of their office. See, *e.g.,* H. Rep. No. 308, 80th Cong., 1st Sess., p. A134 (1947).

Throughout the removal statute's history, its basic purpose has been viewed as protecting the interests of the national government by shielding its agents from vexatious litigation regarding their official duties in a forum potentially more subject to local influence than a federal court. Thus, the removal concept is actually an incident of federal supremacy.[9]

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[9] For a general discussion of the background and present application of the provisions governing removal of suits against federal officers (28 U.S.C. 1442), see 1A Moore, *Federal Practice* ¶0.164, pp. 821–839 (1965). Moore points out that Section 1442 creates "a jurisdictional right of removal quite apart from the

Indeed, the congressional intent in establishing and expanding this concept has appeared so manifest that most courts have found it generally unnecessary to discuss the underlying premises upon which removal is grounded. This Court has frequently proceeded in this fashion, while noting in passing that the removal statute should be construed to give full effect to the purpose for which it was enacted. See, *e.g.*, *Venable* v. *Richards*, 105 U.S. 636, 638; *Maryland* v. *Soper*, 270 U.S. 9, 33; *Colorado* v. *Symes*, 286 U.S. 510, 517.

Perhaps the best summary of the underlying intent of Congress is given in *Tennessee* v. *Davis*, 100 U.S. at 263, where the Court stated that the federal government

> * * * can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred

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general removal statute" (28 U.S.C. 1441), and, unlike that section, requires no separate basis of federal court jurisdiction (*id.* at 825, 837–838) (see A. 42).

> by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.[10]

In light of the removal statute's background, it seems clear that Congress intended it to be read in a generous, not a grudging, manner. To suggest, as did the court below (A. 70), that the "color of office" test is narrower than the "official immunity" standard of *Barr* v. *Matteo* because statutory construction is involved in the former situation and a court-fashioned rule in the latter is consistent neither with the history of the statute nor sound judicial analysis. Here the Tenth Circuit simply failed to give adequate effect to the manifest purpose of the removal statute.

It follows from the essential thrust of the removal statute that *at least* those officials who are acting within the outer perimeter of their official duties are plainly entitled—as is the federal government itself [11]

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[10] Cf. *In re Neagle*, 135 U.S. 1, 61–62.

[11] It was pointed out in *Barr* v. *Matteo* (360 U.S. at 571), that the government, not just the individual officer, has a vital stake in the avoidance of suits in respect of acts done in the course of official duties. See also *Mayor* v. *Cooper*, 6 Wall. 247, 253; *Tennessee* v. *Davis*, 100 U.S. at 262; *Bradford* v. *Harding*, 284 F. 2d 307, 309 (C.A. 2) (see *supra*, p. 15).

to be protected against having a matter in controversy litigated in a potentially prejudiced or hostile State forum. In fact, one of the purposes of Section 1442 is to make it unnecessary to prove any actual prejudice or hostility. Indeed, to give the congressional intent underlying 28 U.S.C. 1442(a)(1) appropriate effect, every federal officer who has even an arguable claim that he was acting pursuant to his official duties at the time in question (hence, under "color of office") should be able to remove the case to federal court. Only in this manner can it be assured that the interests Congress sought to protect in enacting and expanding the statute will be adequately served. At all events, for the reasons stated earlier (*supra*, p. 10), it is unnecessary to go that far here in order to find that removal was proper. Whatever may be the ultimate limits of the removal statute, petitioners plainly were acting under "color of office" when they committed—if they did at all—the alleged acts on which respondent grounded his suit.

III. THE HOLDING BELOW TENDS TO UNDERMINE THE "OFFICIAL IMMUNITY" DOCTRINE OF BARR V. MATTEO, 360 U.S. 564

There is an obvious interplay between the "color of office" test of 28 U.S.C. 1442(a)(1) and the "official immunity" standard of *Barr* v. *Matteo* in suits brought against federal officers in State courts for torts allegedly committed in connection with the performance of their official duties. Indeed, the central issue in the instant case involves the nature of that interplay. Of course the concepts are not subject to precise or

quantitative definition. "Color of office" may mean different things to different persons, and may be construed somewhat differently depending on the context in which the phrase is used. Similarly, it is not always easy to describe with exactitude the area encompassed within "the outer perimeter of [an officer's] line of duty" (360 U.S. at 575), or what constitutes "action in the line of duty" by a public official (*ibid.*). But there is no necessity here to attempt to give precise definition to these terms. Rather, the problem here simply involves the comparative reach of the two concepts, relative to each other. Whatever the ultimate scope of each, the test for removal is necessarily broader than the standard for immunity. Accordingly, the court of appeals' restrictive interpretation of the "color of office" test must be rejected.

In *Barr* v. *Matteo* the considerations underlying the doctrine of official immunity were succinctly explained (360 U.S. at 571):

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.[12] * * *

[12] See also *Howard* v. *Lyons*, 360 U.S. 593 (decided along with *Barr* v. *Matteo*); *Spalding* v. *Vilas*, 161 U.S. 483; *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949 (quoted from at length in *Barr* v. *Matteo*, 360 U.S at 571–572); *Norton* v. *McShane*, 332 F. 2d 855 (C.A. 5), certiorari denied, 380 U.S. 981.

Here the Tenth Circuit held that the "color of office" test for purposes of removal is "much narrower" than the immunity standard, and that an extensive factual hearing, not required for determining whether the officer acted within the outer perimeter of his duties, is necessary in determining removability. That holding effectively juxtaposes the two concepts, and thus poses a real danger of defeating, to a considerable extent, the purposes underlying the *Barr* v. *Matteo* doctrine.

Under the decision below, federal officers asserting their right to remove a suit brought against them in a State court may be subjected to the very sort of oppressive litigation from which the immunity doctrine is designed to protect them in order to effectuate that right.[12] Even an officer who goes beyond the outer perimeter of his assigned duties may nevertheless be acting under a claim or "color" of his office. Yet the court below, while noting that the undisputed evidence "may have adequately supported the finding of immunity," concluded that it was nonetheless "insufficient to support" a determination that the alleged acts were performed under color of office for removal purposes (A. 69). This, quite literally, stands the law on its head.

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[12] It was further explained in *Barr* v. *Matteo* that "[t]he fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, *despite the allegations of malice in the complaint* * * *" (360 U.S. at 575; emphasis added). Thus, the fact that respondent asserted that petitioners here acted maliciously is insufficient to render the immunity defense, much less the "color of office" test for removal, inapplicable. In fact, such an allegation can almost invariably be expected in a complaint of this kind (see *supra*, p. 12).

By requiring the application of a more stringent "factual" test for removal than for dismissal of a suit under *Barr* v. *Matteo*, the holding below threatens to undermine the purposes of the "official immunity" doctrine in a significant class of cases—those brought against federal officers in State courts. The result, quite predictably, will be to foster just the sort of harassing and time-consuming litigation from which the immunity doctrine seeks to insulate federal officers. Moreover, in enacting 28 U.S.C. 1442(a)(1), Congress could hardly have intended that a federal district court would be required not only to reach the merits of the immunity defense but to go further and apply a higher standard in deciding whether the suit was within its jurisdiction as having been properly removed. Yet that result flows logically from the decision below. And, as a concomitant to that aspect of that holding, should a district court conclude that, applying the Tenth Circuit's approach, a particular suit was not removable—albeit probably subject to dismissal under *Barr* v. *Matteo*—it would nonetheless be required to remand to the State court for its assessment of the immunity defense and, at least possibly, for trial (see A. 70). All this of course would result in a serious impairment of the protection heretofore thought afforded by the immunity doctrine, as well as depriving federal officers of the federal forum that Congress prescribed for such litigation.

Instead, the correct approach is just the opposite of that employed here by the Tenth Circuit. The "color of office" test for removal should be viewed as broader, not narrower, than the "official immunity" standard, so that at least some cases removed

to a federal court might actually be tried there, with the immunity defense having been rejected as inapplicable. Otherwise, the removal statute becomes an empty shell. Under the approach of the court below, if a case is removable it is perforce subject to dismissal under *Barr* v. *Matteo*. But Congress certainly did not provide a federal forum for such litigation if those courts would be limited either to dismissing the case or remanding it to the State courts.

Of course, often a removed case is subject to dismissal under *Barr* v. *Matteo*, as the district court here concluded (A. 61; see also *Poss* v. *Lieberman*, 299 F. 2d at 360–361, and generally the cases cited in note 15, *infra*). But that simply reflects the fact that many such suits are encompassed within both the "color of office" test and the "official immunity" standard. What Congress obviously contemplated by enacting and enlarging the scope of Section 1442 was that most suits brought against federal officers would be removable to a forum perhaps less parochial in outlook, less subject to local pressures. Only when the action complained of had no conceivable connection with the officer's governmental duties, or there was no causal relationship between those duties and the conduct at issue, would removal even arguably be improper.

Contrary to the view of the court below, the "color of office" test should not be viewed as providing only "a rather limited basis for removal" (A. 68). Nor, "[t]o be eligible for removal," should the officer be required to "exclude the possibility that the suit is based on acts or conduct not justified by his federal

duty" (A. 69). Placing that substantial a burden on federal officers would result in few removals and, in all likelihood, in extensive litigation about the threshold issue of removal which would, in turn, tend to defeat the purpose of the "official immunity" doctrine to protect those officers from such burdens.

Other courts of appeals have recognized the force of these arguments, and have reached results contrary to the holding below. *E.g.*, *Allman* v. *Hanley*, 302 F. 2d 559, 562 (C.A. 5) ("the allegation that petitioners were officers acting under color of office in the employment of the United States was sufficient [for the statute] requires only a short, plain statement of facts entitling a defendant to removal"); *North Carolina* v. *Carr*, 386 F. 2d 129, 131 (C.A. 4) ("the central and grave concern of the [removal] statute is that a Federal officer shall not be forced to answer for conduct assertedly within his duties in any but a Federal forum"). Indeed, in *Poss* v. *Lieberman*, 299 F. 2d at 359 (C.A. 2), the court recognized the proper relation between the removal and immunity concepts, in stating:

> * * * [R]emoval is based on a federal interest in the matter, the facts underlying which may be stated in the removal petition itself, whether or not federal jurisdiction existed over the claim as stated in the complaint as originally served. Where a federal officer asserts a privilege for acts done under color of his office the defense is based upon a federal right, the purpose of which is to prevent federal employees from being unduly harassed by "vindictive or ill founded damage suits brought

> on account of action taken in the exercise of their official responsibilities." Barr v. Matteo, 360 U.S. 564–565 * * *. Consequently, the federal government has a special interest in such matters which justifies the granting of removal jurisdiction to the federal courts in such cases. * * *[14]

See also *Rachel* v. *Georgia*, 342 F. 2d 336, 340 (C.A. 5), affirmed, 384 U.S. 780, 793.[15]

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[14] This was plainly understood by the district court here. That court stated (A. 42): "The removal in this case is based on federal interest in the matter, facts underlying which may be stated in the removal petition itself, and from which it [is] determined whether or not federal jurisdiction existed over the claim as stated in the complaint as originally filed and served."

Similarly, the district court here perceived the interrelationship between the "color of office" and "official immunity" concepts (see A. 42–43, where the court referred to *Barr* v. *Matteo* in a passage virtually identical to that quoted above from *Poss* v. *Lieberman*). Quite properly, the court pointed out that "if, upon hearing of the case, it should develop that the acts of the defendants though allegedly done by them when acting under color of their office, were not so committed, then the Court, upon a renewal of plaintiff's motion to remand, would further consider it" (A. 43).

[15] Decisions of several other circuits also implicitly reject the approach taken here by the court below. See *Sarner* v. *Mason*, 228 F. 2d 176, 178 (C.A. 3); *Meredith* v. *Van Oosterhout*, 286 F. 2d 216 (C.A. 8), certiorari denied, 365 U.S. 835; cf. *O'Campo* v. *Hardisty*, 262 F. 2d 621, 624 (C.A. 9); *Murphy* v. *Kodz*, 351 F. 2d 163, 165 (C.A. 9); *Preble* v. *Johnson*, 275 F. 2d 275 (C.A. 10). Other decisions in the Second and Fifth Circuits are in accord with the holdings in the *Allman* and *Poss* cases on this issue. *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F. 2d 655, 660 (C.A. 2), certiorari denied, 374 U.S. 827; *Blitz* v. *Boog*, 328 F. 2d 596, 600 (C.A. 2) certiorari denied, 379 U.S. 855; *DeBusk* v. *Harvin*, 212 F. 2d 143, 146 (C.A. 5); *State of Texas* v. *National Bank of Commerce of San Antonio*, 290 F. 2d 229, 231 (C.A. 5), certiorari denied *sub nom. Falkner*,

Here the Tenth Circuit seemed to imply that its approach could be justified on the ground that removability must be stringently tested to avert improper infringements upon the legitimate interests of the States in enforcing their laws. There can be no quarrel with the general proposition that such infringements should be avoided. But the very case relied upon by the court below in this regard (see A. 69), indicates that this consideration was misapplied here. In *Maryland* v. *Soper,* 270 U.S. 9, 33, this Court stated that

> * * * the statute does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority. It is enough that his acts *or his presence at the place in performance of his official duty* constitute the basis, though mistaken or false, of the state prosecution [emphasis added].

Here it is undisputed that petitioners' only contacts with respondent were within the walls of Leavenworth prison. Removal of a suit by a federal prisoner against federal prison officials based upon torts allegedly committed within a federal prison located upon United States property (see *Hayes* v. *United States,* 367 F. 2d 216, 218–220), and under the exclusive control and management of the Attorney General of the United States (18 U.S.C. 4001), obviously could not encroach upon any valid interest of the State of Kansas. Nor does removal in such circumstances en-

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Banking Commissioner v. *National Bank of Commerce of San Antonio, Texas,* 368 U.S. 832. Neither the *Allman, Poss* or *Carr* case, it should be noted, was mentioned by the court of appeals.

danger the delicate balance between state and national governments which exists in our federal system—particularly since respondent was not and is not a citizen of Kansas, and was located there only because of his incarceration in a federal penal institution (see note 1, *supra*).

Indeed, the removal provisions are peculiarly applicable to suits brought against federal prison officials in State courts. Such suits generally turn upon the "official immunity" defense, which is solely a matter of federal law (*e.g., Howard* v. *Lyons,* 360 U.S. 593, 597), or may entail the construction and application of statutes and regulations of the federal government relating to the management of federal penal institutions. Thus, the particular State in which the federal prison is located is unlikely to have any significant interest in the maintenance or outcome of tort suits by prisoners brought against the prison officials. See, *e.g., Horne* v. *Aderhold,* 1 F. Supp. 690 (N.D. Ga.); *Jones* v. *McGill,* 46 F. 2d 334 (D. N.H.). Moreover, the potential for harassment of federal prison officials by embittered or simply litigious prisoners is considerable.[16]

[16] It should be noted that the district court correctly indicated that this Court's decision in *United States* v. *Muniz*, 374 U.S. 150, is inapposite here, since all the Court held was that an action under the Federal Tort Claims Act for injuries allegedly incurred while confined in a federal prison was maintainable (A. 43, 54). Nor are this Court's decisions in *Pierson* v. *Ray*, 386 U.S. 547, and *Dombrowski* v. *Eastland*, 387 U.S. 82, relevant here, since neither involved a removal question. And in *Wheeldin* v. *Wheeler*, 373 U.S. 647, not only was no removal issue involved, but the government conceded that the immunity doctrine was inapplicable (*id.* at 650–651).

Finally, there is no need here for any further proceedings on the issue of removability. The only inquiry necessary has been satisfied; it is beyond dispute that petitioners' "acts or [their] presence at the place [in question] in performance of [their] official duty constitute the basis, though mistaken or false" of respondent's action. *Maryland* v. *Soper,* 270 U.S. 9, 33. Moreover, the charges here made are of misuse of power "possessed by virtue of [federal] law and made possible only because the wrongdoer is clothed with the authority of" federal law. Cf. *United States* v. *Classic,* 313 U.S. 299, 326. The officer, of course, is not required, in order to remove, to admit that the acts alleged actually took place. *Maryland* v. *Soper,* 270 U.S. at 33.[17]

It is our view that the district court was correct here not only in upholding removal but also in dismissing the suit against petitioners under *Barr* v. *Matteo.* However, since the court of appeals did not

[17] In opposing the petition for a writ of certiorari, respondent stated that "petitioner Willingham failed or refused to answer interrogatories which dealt specifically with whether or not he was warden or acting as warden at the time the torts were committed" (Resp., p. 5). But respondent failed to make this argument in the district court. The full reference to the substance of interrogatories made in respondent's motion to remand is quoted at note 3 *supra* (see A. 30–32), and its relates only to Willingham's failure to identify the "Doe" and "Roe" defendants. At all events, this objection to removal in no way relates to Jarvis's right to remove. And since Jarvis was entitled to remove, the entire case, against *all* defendants, was properly removable to federal district court. *City of Gainesville* v. *Brown-Crummer Co.*, 277 U.S. 54, 60; *Barney* v. *Latham*, 103 U.S. 205, 211–213; *Murphy* v. *Kodz*, 351 F. 2d 163, 166–167; *Allman* v. *Hanley*, 302 F. 2d 559, 562 (C.A. 5). This, as well, was recognized by the district court here (see A. 43–44).

reach the issue whether the suit was properly dismissed under the "official immunity" doctrine, there is no necessity here for exploring the limits of *Barr* v. *Matteo*. Whatever the precise scope of the immunity doctrine, the "color of office" test for removal is necessarily broader, and is at all events sufficiently broad to support removal here.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 228

JOHN T. WILLINGHAM and C. A. JARVIS,

Petitioners,

v.

DANIEL MORGAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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ARGUMENT:

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28 U.S.C. §1447(d) 17

RULE:

F.R. Civ. P. 56(e) 14

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 228

JOHN T. WILLINGHAM and C. A. JARVIS,

Petitioners,

v.

DANIEL MORGAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the court of appeals (A. 66-70) is reported at 383 F.2d 139. The opinions of the district court (A. 40-41, 51-61) are not reported.

Jurisdiction

The judgment of the court of appeals was entered on October 5, 1967. A timely petition for rehearing was denied on March 11, 1968. On June 10, 1968, Mr. Justice White

extended the time for filing a petition for a writ of certiorari to and including June 24, 1968 (A. 71). The Petition was filed on that date and was granted on December 9, 1968 (A. 72). The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

Questions Presented

1. Whether the court of appeals erred in remanding this case to the district court for a factual determination to establish whether the alleged acts of petitioners were in fact committed under "color of office": (A) on the grounds of the adequacy of the record to support this claim of "color of office"; or (B) on the ground that its decision to remand is not dependent upon its holding that the test for "color of office" is narrower than the standard for "official immunity" of federal officials.

2. Whether, on the bases of the record here and of the nature of the opinion of the court of appeals, it would be more appropriate for this Court to abstain from a decision on the relationship between the scope of the immunity doctrine and that of the removal power respectively.

Statutes Involved

28 U.S.C. §1442 provides, in pertinent part:

> Federal officers sued or prosecuted.
>
> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the

United States for the district and division wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

* * * * *

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties * * *.

And 28 U.S.C. §1446 provides, in pertinent part:

Procedure for removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

Statement

Respondent adopts, in general, the statement of the case as presented by petitioners' brief (Br. 3-7), with, however, the following additional facts revealed by the record.

While the case was still pending in the Kansas court, respondent served upon petitioner Willingham lengthy "in-

terrogatories" (A. 19-20). After removal to the United States District Court, he filed therein a "Verified Motion for Order Compelling Answers to Interrogatories" (A. 33-37). Several of these interrogatories would appear to be directly relevant to the question whether petitioners were acting under "color of office" at the time of the alleged acts by petitioners, particularly No. 14 (A. 19), No. 32 (A. 22), Nos. 51, 53 and 54 (A. 26-27). The court of appeals noted in its opinion (A. 70):

> It may be that the answers to some of appellant's interrogations would provide a factual basis for the determination of the removal question. We note that these interrogations were not answered nor do we find that appellees were excused from answering them.

Summary of Argument

The court of appeals, in a case of first impression, held that the "color of office" test for removal is "much narrower" than the standard for determining a federal officer's immunity from suit, and that the case should be remanded to the district court for a factual determination whether federal prison officials were acting under color of office in allegedly committing torts against a prisoner.

The right of removal is completely statutory, and all statutory requirements must be complied with. 28 U.S.C. §1446(a) requires that the removal petition be supported by a short, plain statement of facts. Averments that the officer was acting under color of office are conclusionary in nature and are insufficient jurisdictional basis for the district court in removal proceedings. This Court has required a candid and specific averment of facts from which the court

may conclude that the officer was acting under color of law. This requirement goes to the jurisdiction of the court, which cannot be waived and may be raised at any time.

The record in this case reveals only one single uncontroverted fact—that the only contact which the prison officials had with the prisoner was within the walls of the prison. An affidavit contained a recital of their duties, but no effort was made to supply facts as to the circumstances of the incidents or to show how they may have been related to the duties of the officer. The court of appeals was correct in holding that the record was insufficient to support the jurisdiction of the district court and in remanding to that court for a factual determination on the removal question.

The holding of the court of appeals on the comparative scope of the "color of office" test and the immunity standard was unnecessary to the court's disposition of the case, which must be remanded for a factual determination of the removal question in any event. Respondent is ready to concede that the court's holding in this regard was erroneous because unsupported by either sound reason or authority. The only reason advanced by the court was that the removal power, being of statutory origin, is to be more narrowly interpreted than the standard for judicially-created immunity. The authorities cited stand for the proposition that in the automobile accident cases, the right to removal may not be present and is therefore narrower than the concept of the "scope and course of employment." They do not support the proposition that the "color of office" test is narrower than the immunity standard.

Finally, the record in this case is not fully enough developed to serve as the basis for this Court's decision on

the merits. It would be more appropriate to have a factual determination in the district court on the removal issue, so as to provide a more adequate record for review of the legal issues by this Court.

ARGUMENT

I.

The Court of Appeals Did Not Err in Remanding This Case to the District Court for a Factual Determination to Establish Whether the Alleged Acts Were in Fact Committed Under "Color of Office," as Required by the Removal Statute, 28 U.S.C. §1442(a)(1).

A. The record in this case is clearly inadequate, under the requirements of 28 U.S.C. §1446(a) and prior decisions of this Court, to sustain federal jurisdiction under the removal statute.

1. This Court has held that, in regard to all courts of the United States inferior to the Supreme Court, "two things are necessary to create jurisdiction, . . . The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it." *Mayor* v. *Cooper*, 6 Wall. 247. The first condition, the constitutionality of a predecessor to 28 U.S.C. §1442(a) was sustained by the Court in *Tennessee* v. *Davis*, 100 U.S. 257, because of the important interest of the federal government in protecting its officials, and thereby its own operations, from vexatious litigation—criminal or civil—in potentially hostile or unfriendly state tribunals. The constitutionality of 28 U.S.C. §1442(a) is not here in question, to the extent that

Congress wishes to exercise its constitutional power to create a right of removal for federal officers prosecuted or sued in state courts.[1]

The right to remove a cause from a state court to a federal court is, however, not derived from the Constitution but is entirely statutory, and in any removal case the first question to be answered is whether all the requirements of the statute have been met. *In re Heisig*, 178 F.Supp. 270, 273 (N.D. Ill.). The present statute, 28 U.S.C. §1442(a), does not give a federal officer the right to remove a case against him from a state to a federal court simply on the ground that he is a federal officer, but he must come within the ambit of the statutory provisions. *Michigan* v. *Banning*, 88 F.Supp. 449 (E.D. Mich.). The categories of federal officials upon whom Congress has conferred this right, as well as the conditions under which they may exercise it, are limited by the terms of the statute. Although "such measures are to be liberally construed to give full effect to the purposes for which they were enacted," *Colorado* v. *Symes*, 286 U.S. 510, the right of removal and the jurisdiction of the federal court to which removal is sought cannot go beyond the limits prescribed in the statute itself.

The removal statute here in question, 28 U.S.C. §1442 (a)(1), under which the right of removal is here claimed, gives such right to federal officers only if the acts forming the basis of the state action against them were done under "color of office." Their claim that the acts fall within this

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[1] In *Maryland* v. *Soper* (No. 2), 270 U.S. 36, 44, the Court refused to discuss the extent to which Congress might enlarge the basis for a claim of the right to remove. An attempt by Congress to extend the right to all federal officials, whether or not the action or prosecution in the state court had any relation to their federal office or duties, might raise serious constitutional questions.

category must be substantiated, and 28 U.S.C. §1446(a) requires that they file in the district court "a verified petition containing a short and plain statement of the facts which entitle him or them to removal" together with a copy of the proceedings in the state court. Since the requirements of §1446(a) apply to various situations in which the removal power may be exercised, e.g., in diversity of citizenship cases,[3] in cases involving federal officials,[4] military personnel,[5] civil rights cases,[6] it follows that the "short and plain statement of the facts" giving rise to the right of removal may need to be more elaborate under some circumstances and less so in others.

In construing the requirement that the record contain a statement of facts showing the basis for the claim to the right of removal, this Court has been quite explicit. In *Maryland* v. *Soper* (No. 1), 270 U.S. 9, the Court granted the State's petition for a writ of mandamus directing the remand of the case to the state court, on the ground that this requirement had not been met. In that case, federal prohibition officers in the performance of their statutory duties had just destroyed an illegal still in a wooded area and were returning to their car to return to their office in order to make an official report of the incident. On the way to the car they found a man lying in the woods who had been shot. They took him to a doctor for treatment, but he died. They then reported the incident to the state officials and were subsequently indicted by the state for his murder.

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[3] 28 U.S.C. §1441.

[4] 28 U.S.C. §1442(a).

[5] 28 U.S.C. §1442a.

[6] 28 U.S.C. §1443.

All of these facts were set forth in great detail in their petition for removal. This Court nonetheless held the statement of facts in their affidavit to be insufficient to confer jurisdiction upon the federal court under the removal statute. The Court's opinion, *Id.*, at 33-35, is worth quoting at some length:

> . . . There must be a causal connection between what the officer has done under asserted official authority and the state prosecution. It must appear that the prosecution of him for whatever offense has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and he must by direct averment exclude the possibility that it was based on acts or conduct of his, not justified by his federal duty. But the statute does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority. It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution
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> We think that the averments of the amended petition in this case are not sufficiently informing and specific to make a case for removal under section 33. We have set forth the account the defendants gave in their amended petition of what they saw and did, but the only averments important in directly connecting the prosecution with their acts are at the opening and close of their petition. . . .
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> These averments amount to hardly more than to say that the homicide on account of which they are charged with murder was at a time when they were engaged in performing their official duties. They do not negative the possibility that they were doing other acts than official acts at the time and on this occasion, or make it clear and specific that whatever was done by them leading to the prosecution was done under color of their federal official duty. . . . It is true that in their narration of the facts, their nearness to the place of Wenger's killing and their effort to arrest the persons about to engage in alleged distilling are circumstances possibly suggesting the reason and occasion for the criminal charge and the prosecution against them. But they should do more than this order to satisfy the statute. In order to justify so exceptional a procedure, the person seeking the benefit of it should be candid, specific and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer. . . .

And in the latter case of *Colorado* v. *Symes*, 286 U.S. 510, the Court while saying that the statute should be interpreted liberally enough to effectuate its purpose, *Id.*, at 517, nonetheless followed the lead of *Maryland* v. *Soper, supra*, denied the right of removal on the same grounds, saying, *Id.* at 518-519:

> . . . The burden is upon him who claims the removal plainly to set forth by petition made, signed and unequivocally verified by himself all the facts relating to the occurrence, as he claims them to be, on which the accusation is based. Without such disclosure the

> court cannot determine whether he is entitled to the immunity. No question of guilt or innocence arises and no determination of fact is required but it must fairly appear from the showing made that petitioner's claim is not without foundation and is made in good faith.

While both *Soper* and *Symes* involved criminal prosecutions, this fact is immaterial, since §1442(a)(1) and §1442(a) apply equally to the removal of both criminal and civil cases, *Goldfarb* v. *Muller*, 181 F.Supp. 41, 47 (D.N.J.), and with the sole exception of *Allman* v. *Hanley*, 302 F.2d 559, 562 (C.A.5), every lower federal court which has considered the question has held that mere averment that the acts alleged were done under "color of office" is insufficient to establish federal jurisdiction in the absence of a factual basis for such a *conclusion*.[6] *See, e.g., Ampey* v. *Thornton*, 65 F.Supp. 216 (D.Minn.); *In re Heisig*, 178 F.Supp. 270 (N.D.Ill.); *Brenner* v. *Kelley*, 201 F.Supp. 871 (D.Minn.); *Tennessee* v. *Keenan*, 13 F.Supp. 784 (W.D. Tenn.); *Logemann* v. *Stock*, 81 F.Supp. 337 (D.Neb.) (holding that the lack of specific factual basis in the removal petition was not fatal, since such basis was disclosed by the attached original complaint).[7] The question was summed up succinctly and accurately in *Michigan* v. *Banning*, 88 F.Supp. 449 (E.D. Mich.), as follows:

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[6] The same requirement has been expressed even in cases in which the court found it had been met. See, e.g., *DeBusk* v. *Harvin*, 212 F.2d 143 (C.A. 5); *Poss* v. *Liebermann*, 299 F.2d 358 (C.A. 8), certiorari denied, 370 U.S. 944; *Meredith* v. *Van Oosterhout*, 286 F.2d 216, certiorari denied, 365 U.S. 835; *Colorado* v. *Maxwell*, 125 F.Supp. 18 (D. Colo.); *Horne* v. *Aderhold*, 1 F.Supp. 690 (N.D. Ga.).

[7] Cf. *Meredith* v. *Van Oosterhout*, 286 F.2d 216, certiorari denied, 365 U.S. 835.

> It appears to this court that defendants labor under the impression that since admittedly they are federal employees all they must do is to so state and to add to their petitions for removal that all acts done by them were done under color of office; that then the case is automatically removed to this court.
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> This was not true under the old law, . . . and it is not true under the present law, §1442 of Title 28, U.S.C.A. . . . application of the law is still limited to those acts done by these employees "under color of such office." Furthermore, this fact must affirmatively appear, not alone by a broad statement in the petition to that effect, but by direct averments which must exclude possibility that any of their alleged acts was not justified by their federal duty. . . .

The requirement is jurisdictional, it cannot be waived, the jurisdictional facts must affirmatively appear, and the question may be raised at any time.[8] *Gainesville* v. *Brown-Crummer Co.*, 277 U.S. 54 (a diversity case). The statute, 28 U.S.C. §1447(c), directs the court to remand the case if at any time during the trial it appears that removal was improvidently granted; and in *Naas* v. *Mitchell*, 233 F. Supp. 414 (D.Md.), the court raised the question *sua sponte* and decided there was no right to removal under §1442 (a)(1).

2. The court of appeals, in a single sentence in the last paragraph of its opinion, held that the record in this case fails to establish that the alleged acts were committed under

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[8] This renders immaterial the fact, pointed out by petitioners (Br. 10, note 5), that it was only on their petition for rehearing that petitioners dealt with the removal issue.

"color of office" (A. 70). Although the court in so holding did not refer to the requirement of §1446(a) nor to the precedents cited above, it is submitted that even a casual analysis of the record in this case will reveal that it is almost completely devoid of a factual basis for such a conclusion.[9]

As was noted by the court in its opinion (A. 69), the only undisputed evidence in the record was that the only contact the petitioners had with the respondent occurred within the walls of Leavenworth Penitentiary. And even this statement appears for the first time, not in the petition for removal (A. 6-10), but in petitioners' affidavits in support of their motion for summary judgment (A. 44-46, 47-49). The averment in the petition for removal that petitioners were, in reference to any of the alleged acts upon respondent, acting under color of office and within the scope of their authority (A. 9) and the averments to substantially the same effect in the affidavits in support of the motion for summary judgment (A. 46, 48) were completely conclusionary in nature.[10] As such they did not fulfill the requirements of §1446(a) nor the tests laid down by this Court in *Maryland* v. *Soper, supra,* and in *Colorado* v. *Symes, supra.* They were inadmissible in evidence under

[9] As petitioners correctly pointed out (Br. 10, note 5), 28 U.S.C. §1442(a)(3) could have been relied upon as the basis for removal, since as penal officers they are also officers of the court. See *Brann* v. *McBurnett,* 29 F.Supp. 188 (E.D. Ark.); *Jones* v. *McGill,* 46 F.2d 334 (D. N.H.); *Horne* v. *Aderhold,* 1 F.Supp. 690 (N.D. Ga.). That provision allows officers of the courts the right of removal if the act was done "under color of office or in the performance of his duties." However, the lack of a factual basis in the record to support the claim of "color of office" is equally fatal to the claim that such acts were done "in the performance of his duties."

[10] See *Potts* v. *Elliott,* 61 F.Supp. 378 (E.D. Ky.).

F.R.Civ.P. 56(e) and were in the nature of conclusions of law to be drawn by the court upon the basis of factual evidence, *Stone* v. *Phillips*, 245 F.Supp. 247 (D. Colo.). The affidavits in support of the motion for summary judgment (A. 44-46, 47-49) set forth in detail a description of the official duties of each of the petitioners. It is significant, however, that neither petitioner refers therein to the incidents forming the basis of respondent's original claim nor makes the slightest effort to give the court even a faint indication as to how or why these incidents qualified as acts done under "color of office" or even "in the performance of his duties." This certainly does not satisfy the burden of submitting a "candid, specific and positive statement of the facts so that the court will be able to determine the validity of his claim for removal." *Colorado* v. *Symes*, *supra*, at 520. It is true that respondent's statement in his verified motion to remand (A. 30-33), to the effect that petitioners were not acting in the performance of their official duties, was also conclusionary in nature,[10] as were the more detailed but similar averments in his verified opposition to the motion for summary judgment (A. 48-51).[11] Petitioners' conclusionary statement that they were acting under color of office was, as the court of appeals noted (A. 69-70), countered by respondent's equally conclusionary statement that they were not so acting. It is clear, at least, that the failure of petitioners to afford a factual basis for the court to draw such a conclusion cannot, therefore, be remedied by any allegations of respondent in the record.[12]

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[11] See *Preble* v. *Johnson*, 275 F.2d 275 (C.A. 10).

[12] Cf. *Logemann* v. *Stock*, 81 F.Supp. 337 (D. Neb.); *Meredith* v. *Van Oosterhout*, 286 F.2d 216 (C.A. 8), certiorari denied, 365 U.S. 835.

It is established, moreover, that the burden is upon him who claims the removal to set forth the factual basis supporting such claim, *Colorado* v. *Symes, supra,* and, if they are challenged, he has the burden of proof. See *Tennessee* v. *Keenan,* 13 F.Supp. 784 (W.D. Tenn.), which discusses extensively the relative burdens of defendant and plaintiff in removal cases.

Further, several of respondent's interrogatories—specifically, No. 14 (A. 19), No. 32 (A. 22), and Nos. 51, 53-54 (A. 26-27)—seem to imply that petitioner Willingham may *not* have been acting as warden at the time of the alleged incidents and may thus raise a question as to whether the alleged acts were "under color of office"; and the court of appeals noted (A. 70) that answers to some of these interrogations might have provided the needed factual basis for the determination of the removal question.[13] In any event it is clear that the petitioners did not bear the burden placed on him who seeks removal, that the record as a whole does indeed fail to establish that the alleged acts were committed under "color of office," and that the removal petition was jurisdictionally defective.

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[13] It is true, as petitioners comment (Br. 27, note 17), that the main thrust of respondent's interrogations as addressed to Willingham was to ascertain the identity of the "Doe" and "Roe" defendants (A. 30-32). However, the few interrogatories mentioned above as part of the record do deal specifically with the question whether or not he was warden or acting warden during the time of the alleged torts, as was pointed out in respondent's opposition to the grant of certiorari (Resp., p. 5). Further, while the failure of Willingham to reply may bolster the case against him, the affidavit of petitioner Jarvis remains jurisdictionally defective because the record fails to establish a factual basis for the removal claim as to both petitioners.

3. The court of appeals remanded the case to the district court for a factual determination whether the alleged acts were committed under "color of office"; and if the evidence did not support this conclusion, then the district court was to remand the case to the state court (A. 70). It is submitted that the court did not err in so doing. It is true that the court's judgment reversing and remanding to the district court was accompanied by a holding, which may ultimately be found to be erroneous, on the interrelationship of the removal power and the immunity doctrine, with which most of the opinion is taken up. It is enough that its judgment is supported by the express finding that the record fails to establish that the acts alleged were committed under "color of office" (A. 70).

Indeed, the action by the court of appeals here presents a very close analogy to the procedure followed by this Court in *Maryland* v. *Soper* (No. 1), 270 U.S. 9, 35-36, and also in *Colorado* v. *Symes*, 286 U.S. 510, 521. In both cases, this Court held that the district judge should have granted the State's motion to remand the case to the state court. In both cases, however, the Court allowed the trial judge, in his discretion, to permit the defendants to amend their petitions for removal in order to establish, if they could, a factual basis for the claim of removal. If the district judge did not so permit, or if the evidence failed to establish such basis, then it became mandatory that the case be remanded to the state court.

This is not to say that the disposal of this case by the court of appeals was the only course open to it. Upon the record in this case, the court of appeals could have simply reversed the district court on its refusal to remand, held the summary judgment proceedings as being *coram non*

judice, and directed the district court to remand the case to the state court of Kansas. What the court of appeals did, in effect, is what this Court did in *Soper* and in *Symes*—that is, it granted a *locus poenitentiae* by permitting the defendants to establish a factual basis, if possible, for their claim of removability. To put it more colloquially, it gave them the chance of another bite at the same apple.

Nor is this action of the court of appeals to be disapproved on the ground that it is necessarily prejudicial to petitioners here or to others in the future. The fear of the Government, of course, arises from the fact that an order of the district court remanding a case to the state court is not reviewable under 28 U.S.C. §1447(d).[14] The effect would be to leave as the law of the Tenth Circuit the opinion of the court of appeals on the interrelation between the scope of the removal power and that of the immunity of federal officials under *Barr* v. *Matteo*—at least until such time as another case might arise on this issue in another Circuit. This result, should the Court deem proper, may be precluded by the framing of an appropriate judgment or mandate by this Court.[15]

Petitioners are in error in interpreting the judgment of the court of appeals to require an "extensive factual hear-

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[14] This Court may, however, review the judgment of the court of appeals requiring such remand to the state court by the district court. See *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464.

[15] Several possibilities suggest themselves. The Court might disapprove the views expressed in the opinion of the court of appeals and remand for a determination by the district court on the removal question. Or the Court, without expressing any opinion on the views of the court of appeals, might remand to that court with directions to retain jurisdiction while the factual determination is made in the district court, so as to avoid the impact of 28 U.S.C. §1447(d).

ing" on the question of removability (Br. 20) or to be likely to result in "extensive litigation about the threshold issue of removal" (Br. 23). The court of appeals did not require a *hearing*, either extensive or otherwise. It merely required the district court to make a factual *determination* whether there was any basis for the claim of removability under the statute, 28 U.S.C. §1442(a)(1). It would also permit petitioners to amend their petition in order to invoke removal under §1442(a)(3). No hearing should ordinarily be necessary; the factual determination may, of course, be made by the court on the basis of affidavits of petitioners, in which it should be relatively simple to give a plain, short statement of the facts of the alleged incidents and to indicate—if this is not already apparent—their causal relationship to the authority which they exercise under "color of office." See *Horne* v. *Aderhold*, 1 F.Supp. 690 (N.D. Ga.), holding sufficient removal petition of prison warden, sued for false imprisonment, which stated simply that he was the warden and had done nothing in the premises except to receive the plaintiff under due commitment by the court. Presumably a hearing would be necessary only where there is a genuine controversy as to the facts themselves. Cf. *Tennessee* v. *Keenan*: the burden of proof is on him who claims removal, but the burden of going forward with the evidence is on the other.

B. THE COURT OF APPEALS DID NOT ERR IN REMANDING THIS CASE TO THE DISTRICT COURT FOR A FACTUAL DETERMINATION TO ESTABLISH WHETHER THE ALLEGED ACTS OF PETITIONERS WERE IN FACT COMMITTED UNDER "COLOR OF OFFICE," ALTHOUGH IT MAY HAVE ERRED IN HOLDING THAT THE "COLOR OF OFFICE" TEST IS MUCH NARROWER THAN THE STANDARD FOR DETERMINING OFFICIAL IMMUNITY UNDER *Barr* v. *Matteo*, 360 U.S. 564.[16]

1. Heretofore no federal court, perhaps wisely, has attempted to define the precise interrelationship between the removal power and the doctrine of official immunity. The two concepts are obviously interrelated, and in many cases both will be applicable. They are, however, not merely different concepts, but concepts of a completely different order or category. They differ in their origin and historical development, in the purpose which they serve, in the test which determines the applicability of either concept or both in a particular case, and finally, in their effect. It may be helpful to compare them briefly.

Immunity

The concept of official immunity is largely of judicial making, *Barr* v. *Matteo*, 360 U.S. 564, 569. Legislative and

[16] Counsel for respondent has found this a most difficult question to brief, largely because of the lack of facts in the record and the inconclusive nature of the opinion of the court of appeals. Respondent, while not agreeing fully with all the views advanced in petitioners' brief, is ready to concede that the court of appeals may have erred in holding that the "color of office" test is "much narrower" than the standard for official immunity, since the holding seems to be unsupported by either reason or authority. At the same time, for the reasons already advanced, respondent continues to urge that—no matter what the respective tests—the record is inadequate to support federal jurisdiction under the applicable removal statute. The discussion which follows is intended to explain respondent's position in this regard.

judicial immunity are deep-rooted in the common law, and the former is secured constitutionally.[17] The immunity of executive officials would seem to have appeared fairly recently, in the 1896 case of *Spalding* v. *Vilas*, 161 U.S. 483, holding an absolute privilege for the Postmaster General. A similar absolute immunity was found for a Special Assistant Attorney General, as at least a quasi-judicial officer, in *Yaselli* v. *Goff*, 12 F.2d 396 (C.A. 2), affirmed *per curiam*, 275 U.S. 503. The opinion of the court of appeals held, in a suit for malicious prosecution, at p. 406, that:

> . . . The immunity is absolute and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the Government should speak and act freely and fearlessly in the discharge of their important official functions. . . .

And Judge Learned Hand, in *Gregoire* v. *Biddle*, 177 F.2d 579 (C.A. 2), at p. 581, stated the test to be used:

> . . . There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer has been found in a balance between the evils inevitable in either alternative. . . .
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> The decisions have, indeed, always posed as a limitation upon the immunity that the official's acts must have

[17] U.S. Const., Art. I, §6. A brief historical summary is given by Chief Justice Warren, dissenting in *Barr* v. *Matteo*, 360 U.S. 564, 578, at 579.

> been within the scope of his powers; . . . What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . .

This was quoted with approval in *Barr* v. *Matteo,* 360 U.S. 564, at 571, in a case involving a libel suit for alleged defamation in a press release issued by the acting director of a federal agency, giving the reason why he had suspended the plaintiffs. The Court held, at p. 575:

> The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint, . . .

This "outer perimeter" concept received further elaboration in *Norton* v. *McShane,* 332 F.2d 855 (C.A. 5), at p. 859:

> . . . The requirements that the act be within the outer perimeter of the line of duty is no doubt another way of stating that the act must have more or less connection with the general matters committed by law to the officer's control or supervision, and not be manifestly or palpably beyond his authority. . . .
>
> • • • • •
>
> There is another limiting factor—the nature of the duties. It is often said that the officer must be performing a "discretionary function". . . .

The Fifth Circuit opinion then quotes with approval from the opinion of Judge Medina on the meaning of "discre-

tionary functions", *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F.2d 655, 659, certiorari denied, 374 U.S. 827:

> There is no litmus paper test to distinguish acts of discretion . . . , and to require a finding of "discretion" would merely postpone, for one step in the process of reasoning, the determination of the real question—is the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?

The sole effect of the immunity doctrine is to give the official a federal defense to a suit against him, no matter what the forum, *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652:

> When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. . . . Federal law, however, supplies the defense, if the act was done pursuant to a federally imposed duty . . . of immunity from suit . . . .

The burden of proof rests upon the plaintiff. See *Norton* v. *McShane*, *Id.* at 861:

> In the face of the Attorney General's affidavit, the plaintiffs cannot rest upon the mere allegations of their complaints unsupported by sworn testimony. It became incumbent on the plaintiffs, by affidavits or otherwise as provided in Rule 56, supra, to set forth specific facts showing that there was a genuine issue for trial as to whether the defendants were acting within the line and scope of their official duties. . . . The plaintiffs introduced no evidence whatever, and

thus failed completely to meet the burden resting upon them.

Removal

The removal power, on the other hand, is completely of statutory origin, and the statutory requirement must be met. *In re Heisig,* 178 F.Supp. 270, 273 (N.D. Ill.). For various classes of federal officers or employees, Congress created different tests for the power of removal. The court noted, in *Naas* v. *Mitchell,* 233 F.Supp. 414, 419 (D. Md.):

> Congress in this field of removal statutes knew what it meant and knew how to state what it meant. When the test of the propriety of removal was an act done "under color of . . . office" or on account of "any right, title or authority" claimed under a law of the United States it was so expressly stated. . . . When the test was an act done by any officer of the courts of the United States "under color of office *or in the performance of his duties,*" it was so stated . . . , and when the basis for removal in cases of suits against government employees for damage resulting from the operation of a motor vehicle was to be predicated merely upon the fact the employee was acting within the scope of his office or employment Congress [so] provided. . . .

The effect of the removal statutes is not to provide immunity from suit or prosecution, but solely to give to the official defendant a federal forum in which to have the case litigated. The purpose of the statutes is to protect federal officials from vexatious and prolonged litigation in potentially hostile or unfriendly local tribunals, thereby running the risk of paralyzing the operations of the national govern-

ment. See *Tennessee* v. *Davis*, 100 U.S. 257, 263, quoted at length by petitioners (Br. 16).

The burden of establishing by evidentiary averments that he comes within the statutory scheme is upon him who seeks removal, *Maryland* v. *Soper* (No. 1), 270 U.S. 9, 33-35, *Colorado* v. *Symes*, 286 U.S. 510, 518-519. The test is that there must be a causal connection between what the officer has done under asserted official authority and the state prosecution or suit. *Maryland* v. *Soper*, *supra*, at 33.

2. Against this background of the statutory and case law of the removal power and the immunity doctrine, the court of appeals approached the task of determining whether the "color of office" test was broader or narrower than the "official immunity" standard—and undertaking which, it is submitted is unreal and also unnecessary to the disposition of the case before it. Impressed by the fact that the immunity doctrine is of judicial origin, while the removal power is statutory in nature, the court felt that the latter should be much more narrowly interpreted than official immunity. In support of this proposition, the court of appeals cited a long list of cases which it construed to hold that the "color of office" test provides a rather limited basis for removal. All of these cases, with one exception, involve automobile accidents while government employees were driving a car "in the scope and course of their employment," and held that establishing such scope and course of employment was not sufficient to establish a right of removal: *Ohio* v. *Dorko*, 247 F.Supp. 866 (N.D. Ohio); *Naas* v. *Mitchell*, 233 F.Supp. 414 (D. Md.); *Galbert* v. *Shivley*, 186 F.Supp. 150 (W.D. Ark.); *Ebersole* v. *Helm*, 185 F.Supp. 277 (E.D. Pa.); *Goldfarb* v. *Muller*, 181 F.Supp. 41 (D.

N.J.); *Fink* v. *Gerrish,* 149 F.Supp. 915 (S.D.N.Y.); *Oklahoma* v. *Willingham,* 143 F.Supp. 445 (E.D. Okla.). A few cases are *contra*: *Pepper* v. *Sherrill,* 181 F.Supp. 40 (E.D. Tenn.); *Norfolk* v. *McFarland,* 143 F.Supp. 587 (E.D. Va.). The court seems to have misunderstood the case of *Brenner* v. *Kelly,* 201 F.Supp. 871 (D. Minn.), which drew a distinction between negligent acts and those performed in the course of duty—a distinction which would effectively eliminate both the removal power and the immunity doctrine in such cases. The court then proceeds to conclude (A. 69) that, while the sole evidentiary fact in the record—that the only contact between petitioners and respondents was within the confines of Leavenworth Penitentiary—although it might sustain a finding of immunity, it was insufficient ground upon which to predicate removability.

The holding of the court of appeals on this score is far from persuasive. It is a lyric leap to conclude that, because in these automobile cases the right to removal is "narrower than" the course and scope of employment, it is therefore "much narrower" than the immunity doctrine, since in none of these cases is the immunity doctrine involved. Further, as the petitioners point out in their brief, removal of a cause to a federal court under this holding would mean that the court would have no choice but to dismiss or grant summary judgment on the basis of immunity. The contrary seems in some cases to be the case. Thus in *Brann* v. *McBurnett,* 29 F.Supp. 188 (E.D. Ark.), it was held that two deputy United States Marshals who were transporting a federal prisoner to the penitentiary and had an accident on the way, were officers of the court engaged in the performance of their duties under 28 U.S.C. §1442 (a)(3) and hence could remove the case to the federal

court, although obviously there was no question of official immunity involved. It is difficult to conceive of a case involving official immunity where there would not also be the right of removal under the "color of office" test. The converse, however, is not true—unless perhaps in the rare situation where a defendant was able to put the plaintiff to his proof, even though defendant could not sustain his burden of proof under the removal statute.

The fundamental error of the court of appeals lies in its attempt to juxtapose these two concepts and to define the respective limits of each. The better approach would be to determine questions of removability and of official immunity separately—each on the merits of the individual case.

3. Respondent, however, is unwilling to concede that the holding of the court below runs counter to the plain meaning of the statute (Br. 9), or that it is at odds with the congressional intent in enacting and "successively expanding the scope of the removal statute." Or with the reference (Br. 16) to expansion of the *concept* of the removal statute. The most exhaustive research into the legislative history of §1442(a) and of its predecessor statutes affords no clue as to what meaning Congress attached to the term "color of office." Secondly, while Congress has successively extended the categories of persons who have the right of removal, it has not changed the underlying concepts involved. See *Oklahoma* v. *Willingham,* 143 F.Supp. 445 (E.D. Okla.); *Goldfarb* v. *Muller,* 181 F.Supp. 41 (D. N.J.).

4. Nor would the holding of the court of appeals appear seriously to undermine the immunity doctrine of *Barr* v. *Matteo, supra.* The defense of immunity is federal law, *Wheeldin* v. *Wheeler, supra; Howard* v. *Lyons,* 360 U.S.

593, 597. As such, it is as available in a state court (should the case not be removed or be irremovable) as in a federal court.

5. In any event, however, it is submitted that, despite possible error in its holding on the relative scope of the removal power and the immunity doctrine, the court of appeals did not err in remanding the case for a factual determination to establish whether federal jurisdiction could be supported under the removal statute.

II.

On the Basis of the Meager Record Before This Court and of the Nature of the Opinion of the Court of Appeals, It Would Be Appropriate for This Court, in the Present Posture of the Case, to Abstain From a Decision on the Relationship Between the Scope of the Immunity Doctrine and That of the Removal Power Respectively.

The present case comes before this Court on a record almost completely devoid of facts. The court of appeals noted that the only uncontroverted fact in the record was that all contacts between petitioners and respondent took place within the confines of the Leavenworth Penitentiary. The affidavits of petitioners in support of both their removal petition and their motions for summary judgment do not serve to enlighten the Court as to what connection, if any, the alleged acts had with petitioners' duties at the Penitentiary. The respondent appeared *pro se*. There was no hearing in the district court. There was no argument in the court of appeals, the case being submitted on the briefs (A. 66). Petitioners state that the first occasion they

had on which to deal with the removal question was on their petition for rehearing (A. 10, note 5). The opinion of the court of appeals is far from illuminating.

Upon occasion this Court has remanded cases in order that a more adequate record might be developed before full consideration of the merits by the Court. Cf. *Naim* v. *Naim*, 350 U.S. 891. That case, of course involved considerations peculiar to constitutional adjudication. Although the present case does not directly involve a constitutional issue, it does, however, raise questions in the delicate area of the relationship between the federal and state judiciaries, and it would seem more appropriate that such questions be resolved on the basis of a more adequate record than is presently before the Court.

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed, at least insofar as it required a factual determination by the district court; or, in the alternative, the case should be remanded to the court of appeals, with directions to retain jurisdiction while such factual determination is being made by the district court.

Respectfully submitted,

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April, 1969.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 228

JOHN T. WILLINGHAM AND C. A. JARVIS, PETITIONERS

v.

DANIEL MORGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Respondent apparently concedes that the court of appeals erred in its central holding that the "color of office" test for removal under 28 U.S.C. 1442(a)(1) is "much narrower" than the standard for determining official immunity from suit under *Barr* v. *Matteo,* 360 U.S. 564 (Resp. Br. 5, 16, 25–26). Nonetheless, respondent contends, the court below properly remanded the instant case to the district court for a factual determination regarding whether petitioners' alleged acts were in fact committed under "color of office" (*id.* at 6–12). This is so, respondent maintains, because the record in his view failed to provide an adequate basis for making such a determination

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(*ibid.*). Respondent's approach, while having some superficial appeal, misses the central point of the case. Accordingly, a short response seems in order.

Respondent's reliance on 28 U.S.C. 1446(a) is misplaced. That procedural provision calls for the filing of "a verified petition containing a short and plain statement of the facts" on the basis of which removal is sought. And that requirement is applicable to federal officers seeking removal of a suit brought against them in a State court. But, as respondent correctly concedes, the statement "giving rise to the right of removal may need to be more elaborate under some circumstances and less so in others" (Resp. Br. 8). The instant situation seems clearly one where an elaborate statement is not required. It is plainly sufficient that petitioners are senior prison officials at Leavenworth Penitentiary; respondent at the relevant times was a prisoner there; the only contact between petitioners and respondent was within the prison walls,[1] and petitioners allege that they were at all times acting within the outer perimeter of their official duties—a fact in any event sufficiently inferable

[1] Respondent notes (Resp. Br. 13) that the express and unchallenged statement of petitioners that their only contact with respondent was within the prison walls appears in their affidavits attached to the motion for summary judgment rather than the removal petition. But even assuming *arguendo* that there was a technical defect in petitioners' pleadings in that regard, it is one which has now been cured, for a court may deem "the petition for removal amended to comport with the proof" (*Buell* v. *Sears, Roebuck & Co.*, 321 F. 2d 468, 470–471 (C.A. 10); *Firemen's Ins. Co.* v. *Robbins Coal Co.*, 288 F. 2d 349, 350 (C.A. 5), certiorari denied, 368 U.S. 875).

for removal purposes from the relationship between respondent and petitioners and the locale of the alleged torts. Further elaborate allegations are not needed in such circumstances. *E.g., Rachel* v. *Georgia,* 342 F. 2d 336, 340 (C.A. 5), affirmed, 384 U.S. 780, 793; *Allman* v. *Hanley,* 302 F. 2d 559, 562 (C.A. 2).

Respondent, however, proceeds to quote at length (Resp. Br. 9–11) from this Court's opinions in *Maryland* v. *Soper,* 270 U.S. 9, and *Colorado* v. *Symes,* 286 U.S. 510, as though those cases were controlling here. But the context of those decisions is substantially different from that in the instant case. Both of those decisions involved attempts to remove State criminal prosecutions of serious offenses for actions allegedly taken at locations other than on federal property. Here, conversely, a civil action was brought against federal officers by a private individual for events allegedly occurring within a federal prison. Respondent attempts simply to brush off those differences as being "immaterial" since Section 1442(a) applies to the removal of both criminal and civil actions (Resp. Br. 11). While the latter statement is of course true, it seems plain that the nature of the suit and the location of the alleged incidents are relevant circumstances in determining how elaborate the statement on which removal is predicated must be. Sound reasons exist for requiring a rather elaborate factual statement where a State criminal prosecution is involved, because of the substantial State interest in the matter, which are not ordinarily present in the case

of a private civil action.[2] As noted above, decisions applying Section 1446(a) in comparable circumstances do not require such elaborate allegations as respondent demands (see *supra,* p. 3). At all events, the crux of the instant case is the interrelationship between the "color of office" test and the "official immunity" standard. This was clearly recognized by both lower courts here, although resolved incorrectly, in our view, by the court of appeals.[3]

As the district court pointed out, the rule pertaining to removal generally is inapplicable "where a defense is asserted based upon a federal right of removal granted under the provisions of 28 U.S.C. § 1442(a)(1) under which removal of this case was sought and obtained" (A. 42). This is so, the district court noted, because "[t]he removal in this case is based on [the] federal interest in the matter, the facts underlying which may be stated in the removal petition itself, and from it determined whether or not federal jurisdiction existed over the claim as stated in the complaint as originally filed and served" (*ibid.*). Quite properly, the district court then immediately referred to the interrelationship between re-

[2] Moreover, in both *Soper* and *Symes* the federal officers had admittedly done *something*, where here there are simply the unsupported allegations of respondent in that regard.

[3] As respondent concedes, the court of appeals never mentioned Section 1446(a) or the requirement thereof on which he now places principal reliance (see Resp. Br. 13). Indeed, the court below expressly stated that "all the requirements of 28 U.S.C. § 1446 were satisfied" (A. 67, n. 2). Respondent also admits, it should be noted, that the "color of office" test for removal and the "official immunity" standard are "obviously interrelated" (Resp. Br. 19).

moval and immunity from suit which is necessarily involved in this sort of situation by stating (*id.* at 42–43):

> Where a federal officer asserts a privilege for acts done under color of his office, the defense is based upon a federal right, the purpose of which is to prevent federal employees from being unduly harassed by vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities. *Barr* v. *Matteo,* 360 U.S. 564.

Similarly, the court of appeals' entire opinion dealt with whether "the trial court erroneously equated the standards which govern common law immunity with those which determine the statutory eligibility for removal of an action commenced in a state court" (A. 69). Thus, the potential existence of official immunity was an operative fact which colored the lengths to which petitioners were required to go in providing factual support for their removal petition.[4]

[4] As the district court noted, petitioners pointed out that they were, at all times pertinent to respondent's allegations, the warden and chief medical officer of the federal prison where respondent was confined, that the only contact they had with respondent was within the prison walls, and that "any act or thing that [they] may have done or authorized to be done concerning [respondent] as is alleged in his complaint, was done and made by them in the course of their duties as officers of the United States * * *" (A. 41). While respondent objects to this formulation as "conclusionary," and takes the position that it provided an inadequate basis for the district court to resolve the removal issue (Resp. Br. 4), it seems plain that, considering all the circumstances here, the district court had sufficient information on which to predicate the granting of the removal petition.

Respondent not only contends that the district court was inadequately apprised of the facts to decide the removal issue. He further asserts that petitioners err in construing the decisions below as requiring an extensive factual hearing on the removal question (Resp. Br. 17–18). Of course it is true that the court of appeals remanded for a "factual determination," and not in terms a hearing, as respondent points out (*id.* at 18). But, were respondent's approach adopted, a hearing would, as a practical matter, be almost inescapably required. Respondent suggests that affidavits might simply be filed which would contain "a plain, short statement of the facts of the alleged incidents" and which would indicate "their causal relationship to the authority [the officers] exercise under 'color of office'" (*ibid.*).[5] But, at least with respect to high-ranking officials such as petitioners, the matter is hardly so simple. The likelihood that the warden or senior doctor at a large prison[6] would recall certain alleged incidents relating to one prisoner, sometimes in the rather distant past, is remote. Similarly, such an individual can hardly be expected to recall what he

[5] The fact is that affidavits were actually filed by petitioners here (see A. 44–48), although not until after the district court had determined that removal was proper and was considering whether dismissal under *Barr* v. *Matteo* was appropriate (but see note 1, *supra*). Nonetheless, they were before the court of appeals. However, an examination of those affidavits discloses that they would in all likelihood be insufficient under the standard respondent would require.

[6] As the record shows, Leavenworth houses more than 2,000 prisoners (see A. 45).

did or did not do on a particular day in the past.[7] Thus, as a practical matter, the most that might be expected is that such a person could state, in conclusory fashion, that he did not do what the complainant had alleged he had done. Here, for example, about all that the defendant prison officials could do would be to reiterate the general denial to respondent's allegations which was contained in the answer they filed in the State court (see A. 40, 51). That, however, would be insufficient under the standard respondent would apply, since, in reply, he would presumably simply reaffirm his factual allegations (see A. 31–32). Removal of actions like the instant one would thus be prevented in virtually every case without the holding of an evidentiary hearing to resolve the controverted allegations. This, of course, would amount to a trial on the merits, and, as discussed in our principal brief, would clearly defeat the purposes of both the removal statute and the doctrine of *Barr* v. *Matteo*. On the other hand, the federal official cannot be required either to admit the allegations of the complaint or submit to a full trial on the merits in order to remove a case under 28 U.S.C. 1442(a)(1). As this Court stated in *Maryland* v. *Soper, supra,* 270 U.S. at 33, "It is enough that his acts or *his presence at the place in performance of his official duty* constitute the basis, though mistaken or false, of the state prosecution" (emphasis added).

[7] In any event, respondent's complaint specified only the initial date on which the alleged incidents occurred, and that date was followed by a phrase such as "and on numerous and divers subsequent dates" in each count (see A. 11–15).

Certainly the district court was entitled to take into account the nature of the positions held by petitioners here. It would present an insurmountable practical problem for senior prison officials such as petitioners to be required to make detailed statements of what they did on a given day and to expect them to relate the details of all possible contacts with one of the thousands of prisoners incarcerated there. As to them, at least, it was enough to refer to their offices and state that the only contact they had with respondent was within the prison walls in the performance of their official duties and that "the acts complained of were [done] solely under color of their respective offices and within the scope of their authority" (A. 9). Should the contrary position be adopted, then the only way to determine whether cases should be removed would be to conduct detailed hearings and thus require the extensive litigation on the threshold issue of removal which Congress never intended and which would go a long way toward undermining the essential thrust of the "official immunity" doctrine in cases brought against federal officers in State courts.[8]

Two other points in respondent's brief warrant passing mention. He noted that several of his interrogatories served on petitioner Willingham "seem to

[8] That the immunity doctrine also applies in State courts, as respondent points out (Resp. Br. 26–27), is hardly a sufficient answer. Reliance on that consideration would be tantamount to requiring federal officers to waive their statutory right to remove to a federal forum in order to avoid the harassing and time-consuming litigation from which the immunity doctrine purports to protect them (see *id.* at 20–22).

imply that [he] may *not* have been acting as warden at the time of the alleged incidents" (Resp. Br. 15; see *id.* at 4). Initially, the verified removal petition stated that Willingham was, "at all times" relevant to respondent's charges, acting in his official capacity as warden (A. 6).[9] It is moreover difficult to perceive how a federal officer can reasonably be expected to choose from among some 59 interrogatories, evidently directed toward the merits, those which he should selectively answer since they might conceivably bear some relationship to the threshold issue of removal.[10] And the amount of time that petitioner Willingham would necessarily have consumed in answering all of these interrogatories would, at the removal stage, have been vexatious in itself and thus inconsistent with the rationale of *Barr* v. *Matteo*.

In concluding respondent suggests that, because the record before this Court is a meager one, it would be appropriate for the Court to refrain from a decision on the relationship between the immunity doctrine and the "color of office" test for removal. This submission is premised on the assertion that, while the case is one "of first impression" (Resp. Br. 4), it "comes before this Court on a record almost completely devoid of facts" (*id.* at 27). It is petitioners' view, however, that the instant record contains an adequate portrayal of the factual circumstances so

[9] See also *United States* v. *Classic*, 313 U.S. 299, 326.

[10] Moreover, respondent concedes that the main thrust of these interrogatories was to ascertain the identity of the 75 "Doe" and "Roe" defendants (Resp. Br. 15, n. 13; see A. 30–32).

that the Court should not only correct the court of appeals' error in holding that the "color of office" test is "much narrower" than the "official immunity" standard (A. 70), but has ample basis for reinstating the district court's holding that the record justifies removal. Determining the relative reach of the two concepts would not appear to require an extensive record in any event, and this case squarely presents, and necessarily involves, the question of the interplay between the two concepts. Respondent's suggested approach of avoiding that issue thus seeks to bypass the central thrust of the decision below—which he concedes is indefensible [11]—and only introduces confusion where none should exist while ig-

[11] Respondent refers to the court of appeals as having committed a "fundamental error" in "attempt[ing] to juxtapose these two concepts and to define the respective limits of each," and suggests that "[t]he better approach would be to determine questions of removability and of official immunity separately—each on the merits of the individual case" (Resp. Br. 26). Of course these two concepts are often inextricably bound together in a single case, as here, and simply do not admit of being treated separately. Moreover, the resolution of one has at least a potential impact on the premises underlying the other, as we have sought to point out. Since respondent agrees that the court below erred in this regard, and that the difference in origin of the two concepts is not determinative as to their scope (see *id.* at 5), it is difficult to understand the significance of his extensive comparative discussion of the two concepts (see *id.* at 19–26). At all events, we of course agree with the statement in one of the concluding paragraphs of that discussion to the effect that "[i]t is difficult to conceive of a case involving official immunity where there would not also be the right of removal under the 'color of office' test" (*id.* at 26).

noring considerations essential to the proper resolution of the instant controversy.[12]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1969.

[12] For example, if the case were remanded to the district court for further proceedings on the removal question, as respondent urges, it would be essential to know whether petitioners would be required to make a showing going beyond that required to establish their immunity from suit. In effect, respondent would have this Court remand for a hearing in which petitioners would be required to go beyond a showing of their immunity from suit, notwithstanding the conceded error of that view. Unless this Court decides the issue, the district court—and all other districts courts in the Tenth Circuit in future cases—would be bound to follow a standard which respondent himself acknowledges is indefensible.

U.S. GOVERNMENT PRINTING OFFICE: 1969

SUPREME COURT OF THE UNITED STATES

No. 228.—October Term, 1968.

John T. Willingham and C. A. Jarvis, Petitioners, v. Daniel Morgan. | On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 9, 1969.]

Mr. Justice Marshall delivered the opinion of the Court.

This case raises some important questions about the power of federal officials to have actions brought against them removed to the federal courts. Petitioners Willingham and Jarvis are, respectively, the warden and chief medical officer at the United States Penitentiary at Leavenworth, Kansas. Respondent Morgan was a prisoner at the penitentiary at the time he filed this suit in the Leavenworth County District Court. He alleged in his complaint that petitioners and other anonymous defendants had on numerous occasions inoculated him with "a deleterious foreign substance" and had assaulted, beaten, and tortured him in various ways, to his great injury. He asked for a total of $3,285,000 in damages from petitioners alone, plus other amounts from the unnamed defendants. Petitioners filed a petition for removal of the action to the United States District Court for the District of Kansas, alleging that anything they may have done to respondent "was done and made by them in the course of their duties as officers of the United States of America . . . and under color of such offices . . . ." Petitioners invoked 28 U. S. C. § 1442 (a)(1), which allows removal to the federal courts of any civil action against "any officer of the United States . . . for any act

under color of such office . . . ."[1] The federal district judge denied respondent's motion to remand the case to the state courts and granted summary judgment to petitioners, holding that recovery of damages was barred by the official immunity doctrine of *Barr* v. *Matteo*, 360 U. S. 564 (1959). Thereafter, respondent perfected an appeal to the Court of Appeals for the Tenth Circuit. That court found it unnecessary to decide the immunity question, for it found insufficient basis in the record to support the District Court's refusal to remand the case to the state courts. 383 F. 2d 139 (1967). The District Court was reversed and the case remanded for further proceedings. Upon petition by the Government, we granted certiorari to consider whether the Court of Appeals decided the removal question erroneously.[2] 393 U. S. 976 (1968). We reverse.

I.

The court below held that the "color of office" test of § 1442 (a)(1) "provides a rather limited basis for removal." 383 F. 2d, at 141. It noted that the record might well have supported a finding that petitioners were protected from a damage suit by the official immunity

[1] 28 U. S. C. § 1442 (a)(1) provides:

"(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of revenue."

[2] The opinion below was in apparent conflict with at least three other Court of Appeals decisions. *Poss* v. *Lieberman*, 299 F. 2d 358 (C. A. 2d Cir.), cert. denied, 370 U. S. 944 (1962); *North Carolina* v. *Carr*, 386 F. 2d 129 (C. A. 4th Cir. 1967); *Allman* v. *Hanley*, 302 F. 2d 559 (C. A. 5th Cir. 1962).

doctrine. But it held that the test for removal was "much narrower" than the test for official immunity, 383 F. 2d, at 142, and accordingly that petitioners might have to litigate their immunity defense in the state courts. The Government contends that this turns the removal statute on its head. It argues that the removal statute is an incident of federal supremacy, and that one of its purposes was to provide a federal forum for cases where federal officials must raise defenses arising from their official duties. On this view, the test for removal should be broader, not narrower, than the test for official immunity. We agree.

The federal officer removal statute has had a long history. See H. M. Hart & H. Wechsler, The Federal Courts and the Federal System 1147–1150 (1953). The first such removal provision was included in an 1815 customs statute. Act of February 4, 1815, c. 31, § 8, 3 Stat. 198. It was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular. It allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act done "under colour" of the statute. Obviously, the removal provision was an attempt to protect federal officers from interference by hostile state courts. This provision was not, however, permanent; it was by its terms to expire at the end of the war. But other periods of national stress spawned similar enactments. South Carolina's threats of nullification in 1833 led to the passage of the so-called Force Bill, which allowed removal of all suits or prosecutions for acts done under the customs laws. Act of March 2, 1833, c. 57, § 3, 4 Stat. 633. A new group of removal statutes came with the Civil War, and they were eventually codified into a permanent statute which applied mainly

to cases growing out of enforcement of the revenue laws. Rev. Stat. § 643 (1878); Judicial Code of 1911, c. 231, § 33, 36 Stat. 1097. Finally, Congress extended the statute to cover all federal officers when it passed the current provision as part of the Judicial Code of 1948. See H. R. Rep. No. 308, 80th Cong., 1st Sess., A134 (1947).

The purpose of all these enactments is not hard to discern. As this Court said nearly 90 years ago in *Tennessee* v. *Davis*, 100 U. S. 257, 263 (1880), the Federal Government

> ". . . can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members."

For this very basic reason, the right of removal under § 1442 (a)(1) is made absolute whenever a suit in a state court is for any act "under color" of federal office, regardless of whether the suit could originally have been brought in a federal court. Federal jurisdiction rests on a "federal interest in the matter," *Poss* v. *Lieberman*, 299 F. 2d 358, 359 (C. A. 2d Cir.), cert. denied, 370 U. S. 944 (1962), the very basic interest in the enforcement of federal law through federal officials.

Viewed in the context, the ruling of the court below cannot be sustained. The federal officer removal statute is not "narrow" or "limited." *Colorado* v. *Symes*, 286 U. S. 510, 517 (1932). At the very least, it is broad

enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. One of the primary purposes of the removal statute—as its history clearly demonstrates—was to have such defenses litigated in the federal courts. The position of the court below would have the anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit would be removed only to be dismissed. Congress certainly meant more than this when it chose the words "under color of . . . office." In fact, one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court. The officer need not win his case before he can have it removed. In cases like this one, Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442 (a)(1).

II.

The question remains, however, whether the record in this case will support a finding that respondent's suit grows out of conduct under color of office, and that it is, therefore, removable. Respondent alleged in his motion for remand that petitioners had been acting "on a frolic of their own which had no relevancy to their official duties as employees or officers of the United States." He argued that in these circumstances the case should be remanded to the state courts. The only facts in the record which in any way respond to this allegation appear in petitioners' affidavits in support of their motion for summary judgment.[3] There, petitioner Willingham de-

[3] This material should have appeared in the petition for removal. However, for purposes of this appeal it is proper to treat the removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits. See 28 U. S. C. § 1653; *Buell* v. *Sears, Roebuck & Co.*, 321 F. 2d 468 (C. A. 10th Cir. 1963);

clares that the only contact he has had with respondent was "inside the walls of the United States Penitentiary, Leavenworth, Kansas, and in performance of [his] official duties as Warden of said institution." Petitioner Jarvis declares, similarly, that his only contact with respondent was at the prison hospital "and only in the performance of [his] duties as Chief Medical Officer and only with regard to medical care and treatment, diagnoses and routine physical examination." Respondent did not deny either of these statements in his responsive affidavit. The question, then, is whether petitioners adequately demonstrated a basis for removal by showing that their only contact with respondent occurred while they were executing their federal duties inside the penitentiary.

The Judicial Code requires defendants who would remove cases to the federal courts to file "a verified petition containing a short and plain statement of the facts" justifying removal. 28 U. S. C. § 1446 (a). Moreover, this Court has noted that "the person seeking the benefit of [the removal provisions] should be candid, specific and positive in explaining his relation to the transaction" which gave rise to the suit. *Maryland* v. *Soper* (*No. 1*), 270 U. S. 9, 35 (1926); see *Colorado* v. *Symes*, *supra*, at 518–521. These requirements must, however, be tailored to fit the facts of each case.

It was settled long ago that the federal officer, in order to secure removal, need not admit that he actually committed the charged offenses. *Maryland* v. *Soper* (*No. 1*), *supra*, at 32–33. Thus, petitioners in this case need not have admitted that they actually injured respondent. They were, therefore, confronted with something of a dilemma. Respondent had filed a "scattergun" com-

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Fireman's Ins. Co. v. *Robbins Coal Co.*, 288 F. 2d 349 (C. A. 5th Cir.), cert. denied, 368 U. S. 875 (1961). See also American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 264–265 (Tentative Draft No. 6, 1968).

plaint, charging numerous wrongs on numerous different (and unspecified) dates. If petitioners were to be "candid, specific and positive" in regard to all these allegations, they would have to describe every contact they had ever had with petitioner, as well as all contacts by persons under their supervision. This would hardly have been practical, or even possible, for senior officials like petitioners.

In a civil suit of this nature,[4] we think it was sufficient for petitioners to have shown that their relationship to respondent derived solely from their official duties. Past cases have interpreted the "color of office" test to require a showing of a "causal connection" between the charged conduct and asserted official authority. *Maryland* v. *Soper* (*No. 1*), *supra*, at 33. "It is enough that [petitioners'] acts or [their] presence at the place in performance [their] official duty constitute the basis, though mistaken or false, of the state prosecution." *Ibid.* In this case, once petitioners had shown that their only contact with respondent occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required "causal connection." The connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times. If the question raised is whether they were engaged in some kind of "frolic of their own" in relation to respondent, then they should have the opportunity to present their version of the facts to a federal, not a state, court. This is exactly what the removal statute was designed to accomplish. Petitioners sufficiently put in issue the questions of official justification and immunity; the

[4] Were this a criminal case, a more detailed showing might be necessary because of the more compelling state interest in conducting criminal trials in the state courts. Cf. *Colorado* v. *Symes*, *supra*; *Maryland* v. *Soper* (*No. 1*), *supra*.

validity of their defenses should be determined in the federal courts.

The Court of Appeals, therefore, erred when it held that petitioners had not adequately demonstrated a right to have their case decided in the federal courts. Because of its resolution of the removal issue, the Court of Appeals did not express any opinion on the propriety of the District Court's award of summary judgment. That question has not been briefed or argued in this Court. Accordingly, we think it proper to vacate the judgment and remand the case to the Court of Appeals so that it may consider this and any other questions which remain in the case.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 228.—October Term, 1968.

John T. Willingham and C. A. Jarvis, Petitioners, *v.* Daniel Morgan.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 9, 1969.]

Mr. Justice Black, concurring.

I concur in the judgment of the Court and in the opinion except for one portion which is quoted below in answer to the Government's contention:

> ". . . It argues that the removal statute is an incident of federal supremacy, and that one of its purposes was to provide a federal forum for cases where federal officials must raise defenses arising from their official duties. On this view, the test for removal should be broader, not narrower, than the test for official immunity. We agree."

I see no necessity in this case for comparing the breadth of the law authorizing removal of cases from state to federal courts with the test "for official immunity." This case raises no question about official immunity from lawsuits for conduct of a government employee. Moreover, the difference between the breadth of a right to remove and a right to claim immunity is purely conceptual and cannot be measured by any means that I know about.

I would therefore eliminate the above quoted statement from the Court's opinion.